Supreme Court, U. S.
FILED
JAN 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1002

JOSEPH SKILKEN AND COMPANY, ET AL., *Petitioners*

v.

CITY OF TOLEDO, OHIO, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. Toledo is a Racially Segregated City	5
2. The Racial Segregation is the Result, in Large Part, of Discriminatory Practices, Both Private and Public	5
3. Effects of Residential Segregation in Toledo	8
4. Public Housing in Toledo is Perceived of, and is in Fact, a Minority Housing Program	10
5. The Need for Low Income Housing in Toledo is Critical, and Particularly Acute for Minorities	11
6. The Skilken Proposal	12
7. a. Disapproval of the Preliminary Platting of the Stateline Road site	15
b. Disapproval of the Preliminary Platting of the Holland-Sylvania Site	16
c. Disapproval of the Preliminary Platting and Rezoning of the Heatherdowns Boulevard Site	17
8. Summary of Facts	19
REASONS FOR GRANTING THE WRIT	22
I. Conflict Among the Circuits	23
II. Relation to Arlington Heights	30
III. Inconsistency With Prior Decisions Of This Court	35
CONCLUSION	37

CASES: Page

Acevedo v. *Nassau County*, 500 F.2d 1078 (2d Cir. 1974) 30, 31
Citizens Committee for Faraday Wood v. *Lindsay*, 507 F.2d 1065 (2d Cir. 1974) *cert. denied* 421 U.S. 948 (1975) 27, 31
Crow v. *Brown*, 457 F.2d 788 (5th Cir. 1972) *affirming* 332 F. Supp. 382 (N.D. Ga. 1971) 27-31, 36
Dailey v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) 30, 31
Davis v. *City of Toledo*, 54 F.R.D. 386 (N.D. Ohio 1970) 7
Gaston County v. *United States*, 395 U.S. 285 (1969) 8, 34
Gautreaux v. *Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974), *cert. granted sub nom.; Hills* v. *Gautreaux*, 419 U.S. 962 (1975) 36
Green v. *County School Board*, 391 U.S. 430 (1968) .. 36
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) .. 6
Kennedy Park Homes Ass'n. v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 407 U.S. 1010 (1971) 27-31, 36
Louisiana v. *United States*, 380 U.S. 145 (1965) 35
Mahaley v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975) 30, 31
Metropolitan Housing Development Corp. v. *Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1974), *cert. granted*, 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975) 22-25, 29-34, 36, 38
Milliken v. *Bradley*, 418 U.S. 717 (1974) 8
Mitchell v. *Robert DeMario Jewelry, Inc.*, 301 U.S. 288 (1960) 36
Porter v. *Warner Holding Co.*, 382 U.S. 395 (1946) .. 36
SASSO v. *City of Union City*, 424 F.2d 391 (9th Cir. 1970) 30, 31

Page

Joseph Skilken & Co. v. *Toledo Metropolitan Housing Authority*, 380 F. Supp. 228 (N.D. Ohio 1974), *rev'd* Nos. 74-2116 and 74-2320 (6th Cir. December 10, 1975) 1, 2, 5, 7-10, 12, 16, 18, 20-36
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 23
United Farmworkers of Florida Housing Project, Inc., v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) 28-31
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) .. 29
United States v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) 26, 29-31
United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 36
United States v. *IBEW*, Local 38, 428 F.2d 144 (6th Cir.) *cert. denied*, 400 U.S. 943 (1970) 36
Vann v. *Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953) 6
Ybarra v. *Town of Los Altos*, 503 F.2d 250 (9th Cir. 1974) 31

CONSTITUTION AND STATUTES:

United States Constitution
—Amendment XIII 2
—Amendment XIV 2
28 U.S.C. 1254(1) 2
42 U.S.C. 1981 2
42 U.S.C. 1982 2
42 U.S.C. 1983 2
42 U.S.C. 2000d 2

Civil Rights Act of 1968, Title VIII, 42 U.S.C. 3601-3619 2

Ohio Rev. Code § 4112.01, et seq. 6

Page

MISCELLANEOUS:

National Committee Against Discrimination in Housing—Urban Land Institute, *Fair Housing and Exclusionary Land Use* (1974) 31

6 Presidential Documents 666 (President's Message to Congress, May 21, 1970) 22

6 Presidential Documents 424, President's Statement on Equal Opportunity in Education, March 24, 1970 23

U.S. Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* (1975) .. 6

U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973) 6

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OPINIONS BELOW

The Memorandum Opinion containing the findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Western Division, are reported at 380 F. Supp. 228, and are reproduced at pages 1a-19a of the Appendix to this Petition. The unreported order of the district court is reproduced at pages 20a-24a of this Appendix. The opinion of the United States Court of Appeals for the Sixth Circuit, not yet officially reported, is reproduced at pages 25a-53a of this Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof of conduct by officials of the City of Toledo and the Toledo City Plan Commission blocking the construction of housing for low income minorities in white areas of a racially segregated community establishes a prima facie case of racial discrimination under the 1968 Fair Housing Act and other federal civil rights laws.

2. Whether the defenses asserted by defendants constitute a compelling governmental interest sufficient to justify their racially discriminatory conduct.

3. Whether a federal district court, after a finding of unlawful racial discrimination against municipal officials, may order those officials to develop a remedial plan of affirmative action to correct the effects of such discrimination.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Thirteenth and Fourteenth Amendments of the United States Constitution; 42 U.S.C. 1981, 1982, 1983, 2000d, and 3601 *et seq.* The relevant provisions are set forth at pages 53a-56a of the Appendix to this Petition.

STATEMENT OF THE CASE

This proceeding was begun on May 28, 1974, and arises out of an effort by a developer and a public

housing authority to build desperately needed housing for low income minority families in predominantly white areas of the City of Toledo. The plaintiffs are Joseph Skilken and Company (hereinafter Skilken),[1] a developer of residential housing; the Toledo Metropolitan Housing Authority (hereinafter TMHA), a local public housing authority; and low income minority persons on behalf of themselves and all other low income minorities living in Toledo who need decent housing and seek the opportunity to live outside areas of minority concentration in the City. The defendants are the City of Toledo and its officials; and the Toledo City Plan Commission and its members. The case involves the efforts of Skilken to provide 140 units of single family, detached housing under the Turnkey III Homeownership Program[2] on three dispersed sites (Heatherdowns Boulevard, Stateline Road, and Holland-Sylvania Road) in white areas of the City of Toledo. The waiting list for the Turnkey III Program is 70 percent minority.

The efforts of Skilken to construct the housing were blocked by defendant Toledo City Plan Commission through its disapproval of Skilken's application for preliminary platting[3] on the Stateline Road and

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[1] The name of the developer is misspelled as "Skillken" in both the district court and the Court of Appeals opinions.

[2] The Turnkey III Homeownership Program is a form of low rent public housing under which homeownership opportunities are provided for eligible families.

[3] Preliminary platting is a procedure established by the Plan Commission whereby an applicant files a preliminary drawing of the proposed plat of land for development. The drawing shows the design of the subdivision, including the layout of lots, streets, sidewalks, and sewers. The purpose underlying this procedure is to assist developers in resolving any technical difficulties before expending time and monies in preparation of a final plat.

Heatherdowns Boulevard sites, and rescinding of its original preliminary platting approval of the Holland-Sylvania site. Further, the City Plan Commission recommended disapproval to the Toledo City Council of Skilken's application for rezoning of the Heatherdowns Boulevard site. On March 26, 1974, the City Council formally denied Skilken's rezoning application.

The plaintiffs claimed that the defendants' conduct was racially discriminatory, in violation of Title VIII of the Civil Rights Act of 1968 and other federal fair housing laws and federal constitutional provisions. The district court denied motions to intervene made by the Toledo Branch of the National Association for the Advancement of Colored People (on the side of the plaintiffs) and by property owners in the Ragan Woods Addition, in the area of the Heatherdowns Boulevard site (on the side of the defendants). Trial was had during the week of July 15, 1974. The district court's decision was issued on August 28, 1974, and its order was entered on October 8, 1974.

The facts on which this Petition is based are contained in the record made at trial. Most of the facts are succinctly set forth in the district court's opinion.[4] In the course of its opinion reversing the judgment of the district court, the Court of Appeals, per Judge Weick, ignored certain key facts found by the lower court and expressed some disagreement with certain of the trial court's conclusions. The Appellate Court,

[4] Other facts adduced at trial are contained in the Appendix in the Court of Appeals and the Plaintiffs' Exhibits which are part of the trial record. References to the Court of Appeals Appendix are referred to as "App." References to Plaintiffs' Exhibits in the trial record are referred to as "Pl. Ex."

however, did not purport to hold the district court's findings clearly erroneous. Plaintiffs will note those areas of disagreement in this Statement of the Case, with appropriate references to the record.

1. Toledo is a Racially Segregated City.

The district court made the basic finding that "the City of Toledo is a racially segregated city with minority groups heavily concentrated in limited sections of the City known as the 'Southwest Corridor' or the 'Black Corridor'" (A. 6a). According to uncontroverted testimony, not more than five percent of the minority population resides outside the "Black Corridor," App. 159, a phenomenon that plaintiffs' expert witness characterized as statistically unnatural.[5] App. 104.

2. The Racial Segregation is the Result, in Large Part, of Discriminatory Practices, Both Private and Public.

Another basic finding of fact by the district court was that among the forces which have brought about the segregated housing pattern in Toledo is racial discrimination, including racial steering by real estate brokers and discrimination by mortgage lending institutions.[6] A. 6a. The district court also found that these forces are still at work. *Id.*

[5] The Court of Appeals' statement that "black families are living in virtually all parts of Toledo," A. 44a, in no way contradicts the undisputed testimony that at least 95 percent of the minorities are confined to the "Black Corridor." Surely, this stark statistic, as well as other uncontroverted evidence, supports the district court's finding that Toledo is racially segregated. Further, the Court of Appeals did not purport specifically to hold that the district court's finding in this regard was erroneous.

[6] The Court of Appeals agreed that there has been private discrimination in Toledo, but questioned whether any such discrimina-

The record also shows that governmental agencies, including the defendant City of Toledo, have been participants in establishing and perpetuating residential segregation in the City. For the most part, these actions have centered around the provision and location of low rent housing under the Public Housing Program, the program which provides the focus of this litigation.

Until 1953, the Toledo Metropolitan Housing Authority (TMHA), a plaintiff in this action, followed an avowed policy of racially segregated public housing in the City. In that year, TMHA proposed to integrate its public housing developments. As the record shows, members of the City Council, under great pressure from residents of white areas of the City, opposed TMHA's change of policy. App. 746, 755. While the City Council later rescinded its disapproval, the U.S. District Court for the Northern District of Ohio, Western Division, ultimately ordered TMHA to implement its proposed integration policy. *Vann* v. *TMHA,* 113 F. Supp. 210 (N.D. Ohio 1953).

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tion occurred after 1968. The Court of Appeals asserted:

> [M]ost of [the private discrimination], we believe, occurred prior to Ohio's Civil Rights Act, Ohio Rev. Code § 4112.01 *et seq.*, and the decision of the Supreme Court in *Jones* v *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) . . . . A. 49a.

The Appellate Court offered no factual support for its remarkable assertion that enactment of a state fair housing law and this Court's 1968 decision in *Jones* automatically eliminated housing discrimination as a problem in Toledo. The persistence of housing discrimination in the country's cities and metropolitan areas has been fully documented on numerous occasions. *See, e.g.,* U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973); U.S. Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* (1975). As the next sentence in the text shows, its continued existence in the City of Toledo was established by uncontroverted evidence presented at trial.

The district court found that even after the *Vann* decision, TMHA, through selection of sites for the construction of family public housing, contributed significantly to the City's segregated housing patterns. A. 6a. The City was a participant with TMHA. Through its consistent disapproval of family public housing sites in predominantly white areas, the City assisted and participated with TMHA in creating and perpetuating the City's segregated housing patterns.

In recent years, TMHA has actively sought to promote racially integrated housing. The City has consistently sought to block these efforts and has failed to fulfill its own equal housing opportunity obligations. In 1970, the City Council, under great pressure once again from area residents, disapproved the location of Turnkey public housing (the same kind of housing involved in this suit) on four sites in predominantly white areas of the City. Pl. Ex. 126. Subsequent to this action, the U.S. Department of Housing and Urban Development (hereafter HUD) found the City Council's conduct in violation of federal civil rights laws, and, as a consequence, suspended the payment of federal monies allocated to the City. App. 722-724; Pl. Ex. 78. Simultaneous with this HUD action, the U.S. District Court for the Northern District of Ohio, Western Division, enjoined the City Council from taking any action which would interfere with the selection of those four sites. *Davis* v. *City of Toledo,* 54 F.R.D. 386 (N.D. Ohio, 1970).

In 1973, the City was again put on notice that it was perpetuating existing patterns of racial segregation through its failure to provide equal housing opportunities and to comply with federal equal opportunity requirements. In that year, HUD found: "The

basic Equal Opportunity Requirements . . . have not been implemented [by the City]." App. 733. HUD also found: "Necessary action to alter the pattern of racial concentration in various areas of the City has not been taken, nor has affirmative action to promote open housing within City Boundaries." *Id.* That finding was confirmed by the Director of the City's own Department of Community Development, who testified that the City has not performed as well in the area of equal opportunity as it should. App. 356.

Thus, uncontroverted evidence shows that the segregated housing patterns that exist in the City of Toledo result, in large part, from racially discriminatory housing practices, and that the defendant City of Toledo, through action and inaction, has substantially contributed to the existing residential segregation.[7]

3. Effects of Residential Segregation in Toledo

The racially discriminatory practices which have created and perpetuated Toledo's racially segregated

[7] The Court of Appeals, while it ignored this uncontroverted evidence, did not appear to contradict it. At one point, the Court stated: "Members of the City Council did not cause nor create the concentration of black people in Toledo . . ." A. 49a To the extent the Court believed that the Council members were not *solely* responsible or that all of the *present* members are not blameworthy, it is correct. The petitioners do not claim, nor need they, that the racial residential patterns of Toledo were created entirely by City officials. At most, we need only prove, as the record amply demonstrates, that the patterns "were in any significant measure caused by governmental activity." *Milliken* v. *Bradley*, 418 U.S. 717, 756 n.2 (1974). (Stewart, J. concurring). And the "governmental activity" may be that of the defendants or any other officials. *See Gaston County* v. *United States*, 395 U.S. 285 (1969). To the extent the Court of Appeals' statement reflects the belief that the City Council *in no way* contributed to the racial residential patterns, it is in total conflict with the evidence.

housing patterns have not only denied minorities equal housing opportunities, but have also denied minorities equal educational opportunities and markedly restricted their access to standard housing.

Toledo's segregated housing patterns are reflected in the racial composition of its public schools. The district court found: "As a result of the segregated housing pattern in the City there is a great disparity in the racial composition of both elementary schools . . . and high schools. . . ." A. 6a n.9. Statistics introduced at trial show that 70 percent of the black elementary students enrolled in the Toledo Public School District attend an elementary school which is 75 percent or more black. In sharp contrast, the Washington Local School District, which serves the northerly and northwesterly portions of the City, has only 25 black students out of a total enrollment of 11,401 pupils. App. 715-716, 718-719.[8]

In addition to segregating Toledo's public schools, the City's racially discriminatory practices, in confining minorities to the "Black Corridor," have also resulted in markedly restricting minority access to decent, safe, and sanitary housing. Evidence introduced at trial showed that there is a positive correlation between minority housing patterns and poor housing quality and that minorities have been confined to cheaper, older homes. App. 103-104, 775, 777-789.

[8] Children residing in the public housing developments, which are at issue in the present case, would attend predominantly white schools in the Maumee, Washington Local, and Toledo Public School Districts. A. 7a; App. 424, 715-721.

4. Public Housing in Toledo is Perceived of, and Is in Fact, a Minority Housing Program.

According to uncontroverted testimony at trial, Toledo residents, including officials of the defendant Toledo City Plan Commission, perceive public housing as a program that serves mostly racial minorities.[9] App. 362, 242-243, 493. This perception is based in fact. The record shows that 70 percent of the low income families who reside in family public housing in Toledo are minorities. Further, 70 percent of the applicants on TMHA's waiting list for family public housing are minorities. And 50 percent of the minority population is eligible for public housing. A. 7a-8a. Finally, 70 percent of those persons accepted into the Turnkey III Homeownership Program (those who would be afforded the opportunity to move into the Skilken homes) are minorities. App. 714. The district court, on the basis of these statistics, drew the "inescapable conclusion" that "decisions regarding public housing disproportionately affect minority groups." A. .[10]

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[9] For example, the then Chairman of the defendant City Plan Commission testified that it was his understanding that more blacks than whites lived in public housing. He also admitted in the course of his testimony that he has characterized public housing residents as being "dirty, lazy and shiftless." App. 243.

[10] The Court of Appeals, in its statement of facts deemed relevant to its decision, inexplicably ignored these important statistics and chose instead to focus solely on statistics relating to persons eligible for public housing, regardless of whether they had applied or otherwise expressed any need or interest. According to these statistics, of the 35,000 Toledo households eligible for public housing, 79 per cent were white and 21 per cent were black. A.44a. The Appellate Court concluded that "there are more than three times as many whites who need public housing than there are blacks needing housing." *Id.* The Court of Appeals, however, did not purport to hold that the district court's finding on the racial impact of the defendants' actions was erroneous.

5. The Need for Low Income Housing in Toledo Is Critical, and Particularly Acute for Minorities.

The record shows that there are approximately 20,000 sub-standard units in the City, App. 738, and that the vacancy rate for standard low and moderate income housing is less than two percent, considered "critical" by HUD. App. 317-318. The record also shows that 40 percent of the City's low and moderate income population lives in sub-standard housing and that 75 percent of these inadequately housed people are minorities. App. 319, 739.

Actions by the City have exacerbated the housing problems of the poor, and particularly the minority poor. Since 1968, the City's Neighborhood Development Program has been responsible for the demolition of approximately 2,900 units of housing in predominantly black areas of the City. App. 327. Fully 90 percent of those persons who have been displaced and relocated since 1968 as a result of the City's demolition activities have been black. App. 729-730. Despite a federal requirement that the City assure that all units that are demolished be replaced, little more than half of the 2,900 demolished units have, in fact, been replaced. App. 326-327.

HUD has criticized the City for its failure to take aggressive action in making low income housing units available and urged the City to "take immediate and sustained action to assure that housing needs of low income families and individuals are being met." App. 728. According to undisputed testimony at trial, at the very time the defendants were blocking construction of the Skilken homes, the City was including these same units in a Workable Program proposal for addi-

tional HUD funding. App. 343-345, 743. As the district court found:

> This creates a situation whereby the City seeks funds for construction of public housing and then turns around and rejects the proposals of the developer which would implement its stated policy. A. 16a n.19.

6. The Skilken Proposal

The Skilken Proposal called for construction of 140 units of single family, detached houses on four sites dispersed throughout the City, outside the "Black Corridor." The units were to be constructed under the Turnkey III Home-ownership program. The waiting list for this program in Toledo is 70 percent minority. Under the Skilken proposal, 50 units were to be constructed on Heatherdowns Boulevard, in a subdivision to be named Denver Terrace; 46 units were to be constructed on Holland-Sylvania Road, in a subdivision to be named Chesterfield Heights; 34 units were to be constructed on Stateline Road and Lewis Avenue, in a subdivision to be named Statlin Terrace; and ten units were to be constructed on scattered lots on Tecumseh Avenue.[11]

The housing units to be constructed on these sites are to be of high quality. Pl. Ex. 185, p. 33. Further, Skilken is an experienced builder of excellent reputation and proven reliability. App. 708-709. Construction costs are estimated at $30,000-$35,000 per unit, as high or higher than the average price of houses in

[11] The Tecumseh Avenue units are not at issue in this case, since no approvals by the City Council or Plan Commission are necessary.

the areas in which the Skilken houses were to be constructed. App. 681, 699.[12]

In the process of selecting the above sites, Skilken was obliged to conform to Plan Commission and TMHA policies. Because of the high concentration of minorities and abundant amount of low income subsidized housing in the "Black Corridor," the Plan Commission has developed a policy of disapproving the construction of such housing in the "Black Corridor." App. 106-109, 136-138, 161, 190-194, 209, 214. Similarly, TMHA, pursuant to HUD directives, requires that sites be located outside areas of minority concentration. App. 382-383.

The record shows that there are only 950 acres of land in Toledo available for the development of low and moderate income housing outside the "Black Corridor." App. 790. Skilken had to search for approximately two years to find sites which conformed to TMHA and Plan Commission site selection policies, examining some 40 different locations. In the process, Skilken worked closely with TMHA and Plan Commission staff to assure that they were in conformance with the policies of those agencies. Several sites were specifically rejected by Plan Commission staff because they were near areas of minority concentration. App. 106-107, 192-194. Skilken's acquisition of the Heather-

[12] For example, in the Stateline area, the average price of homes was only $21,500. App. 681. In the Heatherdowns community, the average price was $30,500. App. 699. Ragan Woods, whose property owners sought to intervene, is a part of the Heatherdowns community. Although the price of houses in Ragan Woods is considerably higher, the fact ramains that the cost of Skilken homes was entirely consistent with the cost of homes generally in the community of which they were to be a part.

downs, Stateline, and Holland-Sylvania sites were a direct result of recommendations by members of the Plan Commission staff. App. 194, Pl. Ex. 185, pp. 85-86. The three sites are located in different areas of the City and all are in areas that are nearly all-white. At trial, the Plan Commission's Deputy Director testified that these sites "were the best sites we had seen so far in the Turnkey project process." App. 110. Specifically, this official testified that they were good sites because they were in areas which contained no concentration of minorities or low income housing and the number of units on each sites was sufficiently small so that they would not in any way impact the area. App. 110-111.

Before construction could begin on the three sites, Skilken was required to secure preliminary platting approval [13] from the Plan Commission and approval for a zoning change from the City Council for the Heatherdowns site.[14] Plan Commission staff members testified that the staff found no technical problems whatsoever with any of the three sites and recommended that the Plan Commission approve all three sites. App. 132-133, 201-204, 683-686, 689-691, 701-702(a); Pl. Ex. 26.

Specifically, the Plan Commission staff found no school, traffic, sewer, drainage, or fill problems connected with the three sites. App. 132-133, 201, 204.

Uncontroverted evidence introduced at trial showed that when the Plan Commission staff recommends ap-

[13] See note 3, *supra*.

[14] Petitions for a change of zone are first filed with the Plan Commission which makes a recommendation to the City Council. After receipt of the recommendation, the City Council conducts a hearing and acts on the application.

proval of preliminary platting applications, the Plan Commission "almost never" overrules, and "overwhelmingly" follows the recommendation. App. 133. Uncontroverted evidence also showed that when the Plan Commission staff recommends approval of an application for a residential zoning change, the Plan Commission overwhelmingly follows their recommendation, and that it is considered "unusual" when they do not. App. 134. At trial the then Plan Commission Chairman, a member of the Commission for 37 years, could not recall any specific instances in which the Plan Commission had not followed the staff recommendation regarding the approval of a platting or rezoning application. A. 10a. The current Chairman, who has been a member of the Plan Commission since 1963, similarly could not recall any instances when approval of platting or rezoning had been denied by the Plan Commission after the staff had recommended approval. App. 440-444.

(a) Disapproval of the Preliminary Platting of the Stateline Road Site.

On January 24, 1974, the Plan Commission conducted a hearing on Skilken's application for preliminary platting of the Stateline Road site. At this hearing, white residents living near the site expressed opposition to the platting on grounds that there was fill material on the site and that it did not drain properly. Additional soil boring tests conducted by Skilken's engineers and an independent investigation by the Plan Commission staff showed that there were no drainage or fill problems. App. 40-41, 116-118, 132-133, 223-224, 303-307, 688. The Plan Commission held three separate hearings on Skilken's preliminary platting application for the Stateline Road site. At the conclu-

sion of the three hearings, on March 7, 1974, the Plan Commission disapproved Skilken's preliminary platting application on the ground that "it was not considered to be in the best interests of the residents in the area." App. 687.

A Plan Commission staff member, employed by the Plan Commission for more than 12 years, testified that he did not know of any instance in which a plat had been disapproved for that reason. App. 224. The then Plan Commission Chairman and its current Chairman testified that in making their decision they relied upon the opinion of a white resident of the area rather than the professional opinions of the licensed engineers and the Plan Commission staff. App. 255, 287, 481-482. The district court found: "No competent fact finder could properly have given any credence to the exaggerated and distorted memories of so unabashedly interested a witness . . . against the scientific evidence which contradicted it." A. 15a.

(b) Disapproval of the Preliminary Platting of the Holland-Sylvania Site.

On January 24, 1974, the Plan Commission held a hearing on Skilken's request for approval of the preliminary platting of the Holland-Sylvania site and unanimously approved Skilken's application. App. 508-512. Later, white residents of the area surrounding this site requested the Plan Commission to reconsider its action and rescind its prior approval of the platting. On March 21, 1974, the Plan Commission rescinded its prior approval on the basis that it had not known that public housing was to be built on the site. App. 646-652, 695. When asked at the Plan Commission meeting whether he had ever rescinded such a matter

as this, the then Chairman of the Plan Commission responded: "Never." App. 652. A longstanding Plan Commission staff member testified at trial that he knew of no instance in the past in which the Plan Commission had rescinded a previous approval. App. 205.

(c) Disapproval of the Preliminary Platting and Rezoning of the Heatherdowns Boulevard Site.

The Plan Commission held two hearings regarding the Heatherdowns Boulevard site, the first to consider Skilken's application for a zoning change from R-A (20,000 square feet) to R-2 (6,000 square feet), and the second to consider both the rezoning and platting applications. At the second hearing, Skilken's counsel suggested that Skilken was willing to amend the rezoning application from R-2 (6,000 square feet) to R-1 (9,000 square feet). App. 130-132. Skilken later acquired additional land and amended his rezoning application to R-1. App. 225, 705. At both hearings, white residents of the surrounding area opposed approval of Skilken's applications in that public housing was to be constructed on the site. At the second meeting, the Plan Commission passed a resolution recommending that Skilken's rezoning request be disapproved because it was inconsistent with the neighborhood. The Plan Commission also disapproved Skilken's application for preliminary platting. App. 589-617.

On March 19, 1974, the Toledo City Council held a hearing on Skilken's rezoning request. White residents of the area expressed opposition to the rezoning on the basis that public housing would be constructed on the site. The City Council denied the request and formalized that action on March 26, 1974. App. 653.

The Heatherdowns site and the surrounding area were annexed to the City of Toledo in the middle 1960's and were zoned R-A (20,000 square feet), the highest residential land use in the City. The Plan Commission's Deputy Director testified that the area "began to experience a transition from rural uses to suburban uses" and is presently under "heavy development pressure." App. 121, 127, 195-196. As the district court found, the site is in what has been characterized as a "holding status" with rezoning contemplated in the near future. A. 11a; *see* App. 121, 167, 195, 224-225. As the district court also found: "The record is . . . replete with rezoning changes in the Heatherdowns area from R-A to various other residential and commercial uses." A. 11a. Further, the record shows that developers who have requested these changes have had no difficulty in having them approved. App. 119-131; Pl. Ex. 85-103, 796, 797. In fact, the area immediately adjoining the Skilken site is currently zoned R-3 (multi-family/2,400 square feet) App. 702(a). The Ragan Woods subdivision, itself, is currently zoned R-B (12,000 square feet). *Id.*

Plan Commission staff members testified at trial that the staff expected the Heatherdowns Boulevard site eventually to be rezoned to R-3 (multi-family/2,400 square feet), App. 125-127, 225-226, and that the staff had recommended a rezoning to R-2 in order to protect the single-family character of the area closely surrounding the site. App. 126-127, 701-702(a). There is also uncontroverted testimony by a Plan Commission staff member that the Plan Commission's rejection of Skilken's request to rezone the Heatherdowns Boulevard site to either R-1 or R-2 was totally inconsistent with its past history, customs, and practices. App. 226.

The current Plan Commission Chairman, then a member, testified that he was opposed to placing public housing in the Heatherdowns area because there was hostility by neighbors in that area. App. 492-494. When asked whether or not the hostility was racial, he responded: "Certainly, a part of it." App. 494.

7. Summary of Facts

The facts that form the basis of this Petition can be summarized as follows:

1. The City of Toledo is racially segregated as a result, in large part, of discriminatory practices.

2. Governmental agencies, including the defendant City of Toledo, have been participants in establishing and perpetuating residential segregation in the City, mainly through the location of low rent public housing.

3. There is a critical need for low income housing in Toledo, particularly for minorities.

4. Approximately 70 percent of the people who live in public housing, and those who are on the waiting list for family public housing (including Turnkey III) are minorities.

5. There is a severe shortage of land, outside areas of minority concentration, for the development of public housing in Toledo.

6. The three sites for the Skilken Turnkey III units are located outside areas of minority concentration and were acquired in response to TMHA and Plan Commission policies requiring that such sites be located outside areas of such minority concentration.

7. There has been no previous instance in which the Plan Commission disapproved requests for plattings for residential developments when the technical requirements were met. The plattings submitted by Skilken met all the technical requirements.

8. In the entire history of the Toledo City Plan Commission, the Skilken proposal for the Holland-Sylvania site is the only occasion on which the Plan Commission has rescinded platting approval.

9. City of Toledo officials in the past have rejected low income housing in white areas in response to protests by white residents of such areas. In the instant case, white area residents vigorously opposed platting of the three sites and rezoning of the Heatherdowns site after they learned that public housing was to be provided there.

10. There have been many requests for rezoning in the Heatherdowns area from R-A (a "holding zone") to various other residential and commercial uses. Until the Skilken proposal, these requests have been granted with no difficulty.

On the basis of these facts, the district court ruled for the plaintiffs. The trial court held that the plaintiffs had met their burden of establishing a prima facie case of racial discrimination. The court then examined the defendants' justifications for their conduct to determine whether these justifications demonstrated that the discrimination was necessary to promote a compelling governmental interest. The City offered the following justifications: that TMHA's past record was poor; that the Skilken proposal for the Heatherdowns site was not beneficial for the neighborhood; that the Stateline site proposal was properly rejected because

the land was subject to flooding; and that the three sites were properly rejected because they involved clustered housing developments. The district court rejected these justifications as "devoid of the requisite 'compelling' nature." A. 16a. On October 8, 1974, the district court issued its Order requiring the defendants, *inter alia,* to submit a comprehensive plan of affirmative action to eliminate discriminatory barriers in the total housing supply.

On appeal by the defendants and intervenor property owners in the Ragan Woods Addition, the Court of Appeals reversed. First, the Court of Appeals ruled that the Motion for Intervention by the property owners in the Ragan Woods Addition should have been granted.[15] Second, the Court held that the trial court's ruling that the denial of the rezoning application for the Heatherdowns Boulevard site was racially discriminatory was incorrect. The Court of Appeals said:

> We live in a free society. The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families. A. 49a-50a.

Third, the Appellate Court ruled that in holding that the defendants' denial of the preliminary platting application for the Holland-Sylvania and Stateline Road sites was racially discriminatory, the district court did not give adequate consideration to the nonracial rea-

[15] Petitioners do not challenge that ruling in this Petition.

sons stated by the defendants, and did not consider the rights of the property owners in the area who opposed the platting. Accordingly, the Court of Appeals remanded the case for determination of these rights. Fourth, the Court of Appeals held that the district court, in ordering affirmative relief, exceeded its authority.

REASONS FOR GRANTING THE WRIT

The petitioners contend the Sixth Circuit, in reversing the decision of the district court, applied a standard of liability that is in conflict with the decisions of other courts of appeals. Petitioners also contend that consideration of the *Skilken* case in conjunction with the factually analogous Seventh Circuit decision in *Arlington Heights, infra* (with which *Skilken* is in direct conflict) will enable this Court to evaluate the important legal issues common to both cases from a broad perspective. With respect to the ruling of the Court of Appeals denying the authority of the district court to enter a remedial order, the petitioners assert that the holding is inconsistent with the prior decisions of this Court. The Petition for a Writ of Certiorari should be granted to resolve the sharp conflicts among the circuits and between the Sixth Circuit and this Court.

It should be observed that this case implicates the rights of minorities extending beyond equal housing opportunity. The questions presented for review here are inextricably linked to school segregation. Among other results, discriminatory housing practices "have deleteriously produced racial separation in the schools. . . ." 6 Presidential Documents 666, 667 (President's Message to Congress, May 21, 1970).

The truth of that statement is demonstrated by the facts of this case. The Toledo school system, like many others, assigns children to school on the basis of the "neighborhood school concept." A. 6a n.9. In view of the residential segregation that exists in the City, the inevitable result is segregated schools. The Skilken proposals not only would have afforded housing opportunities for minorities outside areas of minority concentration, but also would have contributed to desegregating the City's schools. Thus, the effect of the defendants' conduct blocking construction of the Skilken houses is to leave the burden of desegregation entirely on the school system.

But there are limits on the capacity of school systems, alone, to overcome such segregation. As this Court has stressed: "One vehicle can carry only a limited amount of baggage." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22 (1971). This case provides the opportunity to explore ways "of shifting to other public institutions a greater share of the task of undoing the effects of racial isolation." 6 Presidential Documents 424, 436 (President's Statement on Equal Opportunity in Education, March 24, 1970).

I. Conflict Among the Circuits

The decision of the Court of Appeals in this case conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights,* 517 F.2d 409, *cert. granted* 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975). In the *Arlington Heights* case, which this Court agreed to hear on December 15, 1975, the plaintiffs sought to construct federally subsidized housing for

low and moderate income minorities in the defendant municipality, a virtually all-white suburb of Chicago. Because the land needed to be rezoned before the dwellings could be built, the plaintiffs applied to the Village for a change in the zoning designation of the parcel. The municipality denied the rezoning to maintain the "integrity of the zoning plan" and to protect "neighboring property values." *Id.* at 415.

The Court of Appeals, reversing the district court, held that the refusal of the Village to rezone the land constituted racial discrimination. It premised that ruling on four key facts: (1) that minorities are disproportionately overrepresented in the class of persons eligible to reside in the proposed housing; (2) that a high degree of racial residential segregation exists in the Chicago metropolitan area, caused, at least in part, by discriminatory practices; (3) that Arlington Heights is a virtually all-white suburb of Chicago; and (4) that the refusal to rezone would perpetuate the residential segregation in Arlington Heights and the Chicago area.

After concluding that these facts established housing discrimination, the Court of Appeals held that, unless the Village could demonstrate a "compelling public interest" for denying the rezoning, it would be liable under federal law. The defendant offered two justifications for its conduct: (1) to maintain the integrity of its zoning ordinance; and (2) to protect adjoining property values. The Court of Appeals rejected both grounds; neither, it held, constituted a compelling interest.

The present appeal is nearly identical to the *Arlington Heights* case. First, in both suits, minorities are overrepresented in the class eligible for the proposed

units. In *Arlington Heights,* 40 percent of the potential occupants are black. In this case, fully 70 percent of the applicants are minorities. Second, in both actions, the relevant geographic areas show a high degree of racial residential segregation. In *Arlington Heights,* the Court found minorities concentrated in certain parts of the metropolitan area and almost totally excluded from the defendant municipality. Here, 95 percent of the minorities in Toledo reside in the so-called "Southwest Corridor" or "Black Corridor." The immediate areas surrounding the three proposed project sites are almost exclusively all-white.

Third, in *Arlington Heights,* as in this appeal, the refusal to rezone the property for the construction of the proposed housing perpetuated the patterns of residential segregation. Fourth, in both cases, the municipalities sought, *inter alia,* to justify their conduct in order to maintain the integrity of the zoning ordinance and to preserve neighboring property values.

Although the cases are factually similar, the two courts of appeals drew opposite legal conclusions. In *Arlington Heights,* the Court held that those facts proved racial discrimination and that the defendants had to justify their conduct by a compelling governmental interest. In this case, the Appellate Court held that such facts do not constitute racial discrimination, and that the municipal defendants need only show a rational basis for their conduct. By the same token, in *Arlington Heights,* the Seventh Circuit held that the asserted justifications did not satisfy the defendants' burden of showing a compelling interest. In *Skilken,* by contrast, the Sixth Circuit held that even if the

compelling interest test applied, similar justifications asserted by the defendants satisfied it.[16] A. 45a-46a n.4.

In addition to the conflict with *Arlington Heights,* the judgment below is inconsistent with at least four other decisions of courts of appeals. In *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975), the plaintiffs sought to enjoin a newly enacted zoning ordinance which effectively precluded the construction of housing which lower income minorities could afford. The Court of Appeals held that the plaintiff had established a prima facie case of racial discrimination by showing: (1) that blacks were disproportionately overrepresented among the intended beneficiaries of the project; (2) that patterns of racial residential segregation, caused, at least in part, by discrimination, pervaded the St. Louis County area, in which Black Jack is located; and (3) that the passage of the municipal ordinance, by foreclosing 85 percent of the black population in the St. Louis area from residing in Black Jack, would perpetuate residential segregation.

The essential facts which the Court in *Black Jack* held were sufficient to establish a prima facie case of racial discrimination are equally present here. So too are the asserted municipal defenses which the Eighth Circuit rejected.

Two other courts of appeals have found that facts, nearly identical to those proved in this case, established racial discrimination, thus shifting the burden to the municipal defendants to justify their discriminatory

[16] Even the defendants in *Skilken* conceded, in their brief in the Court of Appeals, that if the "compelling state interest" test were applied to their conduct, they could not satisfy that burden. Defendants' Brief at 38.

conduct by a compelling state interest. In *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971), the Second Circuit affirmed a district court judgment requiring local officials to take all necessary steps to permit the construction of subsidized housing for lower income minorities in a white area of the City of Lackawanna. Through various actions and inactions, municipal officials had blocked the construction of housing units for lower income minorities. The Court of Appeals held that such conduct established racial discrimination and that the defendants failed to justify it by a compelling state interest.[17]

The Fifth Circuit applied the same standard of proving housing discrimination by local officials in another case involving facts indistinguishable from those in the instant case. *Crow* v. *Brown,* 457 F.2d 788 (5th Cir. 1972) (per curiam), *affirming* 332 F. Supp.

[17] In *Citizens Committee for Faraday Wood* v. *Lindsay,* 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975), the Second Circuit, in declining to hold racially discriminatory municipal conduct blocking construction of a predominantly *middle income* housing project, reaffirmed the principles it had expressed in *Lackawanna,* and stressed the need for careful scrutiny of governmental actions blocking construction of *low income* housing.

> [T]he whole rationale for carefully scrutinizing governmental actions that adversely affect traditional public housing projects is that these projects are designed for low-income persons and courts are not blind to the fact that racial minorities are disproportionately represented in the lower-income levels of our society. 507 F.2d at 1068-69.

That is precisely the context in which the instant case arises. In *Skilken,* not only was the housing designed for low income persons, but, as the undisputed evidence showed, seven of every ten applicants for the housing were, in fact, racial minorities. The Second Circuit, in its opinion in *Faraday Wood,* cited the district court decision in *Skilken* approvingly.

382 (N.D. Ga. 1971). In *Crow,* private builders, in conjunction with the Atlanta Housing Authority, sought to construct "Turnkey" public housing units (the same type of dwellings involved in this suit) in white areas of Fulton County, in which Atlanta is located. The Court ruled that the refusal of county officials to grant building permits for these projects constituted racial discrimination. It based that decision on the disproportionate number of minorities eligible for such housing, the present concentration of minorities and public housing in limited area of Fulton County, and the impact denying the building permits would have on perpetuating residential segregation.

In another Fifth Circuit decision, *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974), the Court of Appeals held that the defendant municipality had engaged in racial discrimination in refusing to permit sponsors of a low income housing project for minority farmworkers to tie into existing water and sewer facilities when it had granted such permits for white developments. The analogy to *Skilken* is apparent. Here, as the record shows, the Toledo City Plan Commission had uniformly followed the recommendations of its staff on the issuance of preliminary platting, except in this case, and had never rescinded a previously approved platting, except in this case. The record also shows that applications for rezoning in the Heatherdowns area were granted with no difficulty, except in the case of the Skilken application.

The *Delray Beach* Court also evaluated the defendants' conduct in its "historical context" and "ultimate effect" and found, as in *Skilken,* that historically low income housing in the City had been located almost entirely in a racially segregated area. Also as in *Skilken,* the City had previously sought successfully to block plaintiffs' efforts to construct subsidized housing outside area of minority concentration. The conclusion of the Fifth Circuit is equally applicable to the *Skilken* case:

> The ultimate effect of the City's past and present conduct is threefold: first, the confinement of low income housing construction to the segregated area of the City; second, a further reinforcement of segregation in the City because minority citizens in disproportionate numbers live in low income housing; and third, a frustration of efforts to construct housing which [minority] farmworkers can afford. 493 F.2d at 810.

These six cases—*Arlington Heights, Black Jack, Lackawanna, Crow, Delray Beach,* and *Skilken*—all have a "common nucleus of operative fact." *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966). In each instance, a housing sponsor sought to build dwellings for lower income minorities in white neighborhoods. In each case, blacks and other minorities were disproportionately overrepresented in the class of persons eligible for the housing. In each situation, local officials prevented the construction of the housing through various devices: e.g., refusal to rezone land, approve platting, or grant a building permit. In each instance, the action of the governmental bodies perpetuated a high degree of racial residential segregation existing in the city and metropolitan area in which the housing was to be located.

This "common nucleus of operative fact" resulted in consistent rulings of law by four courts of appeals (the Second, Fifth, Seventh, and Eighth Circuits). In essence, they held that such facts establish a prima

facie case of racial discrimination under Title VIII or other federal civil rights laws. Such proof, they further held, shifts the burden to the municipal officials to demonstrate that the conduct under scrutiny is justified by a "compelling governmental interest."[18] Under that test, the courts of appeals in *Arlington Heights, Black Jack, Lackawanna, Crow,* and *Delray Beach* rejected a number of the same defenses offered by the City of Toledo and the Plan Commission in this case, but accepted by the Sixth Circuit. The ruling of the Court of Appeals in *Skilken* on the standard of liability and the defendants' burden ignores these contrary decisions of other courts of appeals. Indeed, the Sixth Circuit failed even to mention any of them in its opinion. The conflict among the circuits should be resolved by this Court.

II. Relation to Arlington Heights

The Sixth Circuit decision in *Skilken* was filed on December 10, 1975. Five days later, on December 15, 1975, this Court granted the Petition for a Writ of Certiorari in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights, supra.* As noted earlier, the contrary *Skilken* and *Arlington Heights* decisions involve a "common nucleus of operative fact" and identical legal issues. Four earlier courts of appeals de-

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[18] *Accord: Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970). *See also SASSO* v. *Union City,* 424 F.2d 291 (9th Cir. 1970). *But cf. Acevedo* v. *Nassau County,* 500 F.2d 1078 (2d Cir. 1974); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974) *cert. denied,* 419 U.S. 1108 (1975); *Ybarra* v. *Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974). None of the decisions of this Court cited by the Sixth Circuit as rejecting the compelling interest test, A. 46a-47a, involved racial discrimination.

cisions that support the *Arlington Heights* ruling—*Black Jack, Lackawanna, Crow,* and *Delray Beach*—also involved similar facts and identical questions of law. And several additional court of appeals decisions, reaching differing conclusions, have dealt with similar legal issues arising out of somewhat different factual contexts.[19] The substantial number of court of appeals decisions involving these issues—all within the last six years—demonstrates the key role that municipal exercise of land use authority plays in facilitating or preventing achievement of fair housing goals. *See* National Committee Against Discrimination in Housing-Urban Land Institute, *Fair Housing and Exclusionary Land Use* (1974).

This Court, after declining to review several earlier court of appeals decisions,[20] has determined to resolve the important legal issues presented by these cases. The decision of this Court is likely to have a decisive bearing on the effectiveness of future efforts to enable

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[19] *See Acevedo* v. *Nassau County,* 500 F.2d 1078 (2d Cir. 1974); *Citizens Committee for Faraday Wood* v. *Lindsay,* 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975); *Ybarra* v. *Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974); *SASSO* v. *Union City,* 424 F.2d 291 (9th Cir. 1970); and *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970).

[20] This Court has previously denied petitions for certiorari in the following other cases involving similar legal issues: *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975); *Citizens Committee for Faraday Wood* v. *Lindsay,* 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

minorities to secure housing outside areas of existing minority concentration. Petitioners urge that the overriding importance of the issues makes it imperative that this Court consider them from the broadest possible perspective. Petitioners submit that, granting this Petition and considering the *Skilken* case in conjunction with *Arlington Heights,* will enable the Court to gain that perspective.

Skilken and *Arlington Heights* are complementary cases. To a large extent, they are mirror images of each other. First, the direct conflict between the decisions of the Sixth and Seventh Circuits has already been explicated in this Petition. The posture in which the two cases are presented to this Court serves to underscore the conflict and sharpen the opposing points of view reflected by the two decisions. In *Arlington Heights,* the district court found that racial discrimination in the exclusion of lower income housing for minorities had not been shown. The Seventh Circuit accepted the basic facts found by the district court, but nonetheless held that racially discriminatory exclusion had been established. In *Skilken,* by contrast, the district court, on similar facts, held that the defendants' conduct was racially discriminatory. The Court of Appeals, however, held that these facts were insufficient to prove a claim of racial discrimination. In short, the conflicting decisions of the Sixth and Seventh Circuits each reversed district court rulings which, on the basis of similar facts, also had reached contrary results. Thus, the conflicting points of view of the two circuits are reflected, not only by the opinions of the respective courts of appeals, but also by the contrary opinions of the two district courts and by an examination of the treatment the respective courts of

appeals accorded to the lower court opinions. Granting the Petition will enable this Court to evaluate the issues from a broad base of differing factual and legal analysis.

Second, the legal basis for the Seventh Circuit decision in *Arlington Heights* was the Equal Protection Clause of the Fourteenth Amendment. In *Skilken,* plaintiffs' claim rests principally on a statute, Title VIII of the Civil Rights Act of 1968, the Federal Fair Housing Act. Granting the Petition in the instant case, and considering it with *Arlington Heights,* will give this Court the opportunity of exploring and defining the standards of liability in cases of alleged housing discrimination involving the respective constitutional and statutory claims.

Third, in *Skilken,* the minorities for whom the lower income housing was intended already resided in the municipality, although in racially segregated neighborhoods. Defendants' conduct maintained their confinement to such neighborhoods. In *Arlington Heights,* the lower income minorities were nonresidents seeking to reside in Arlington Heights. The effect of the conduct of the all-white Village was to maintain their almost total exclusion. By granting the Petition in the instant case, this Court will have the opportunity to consider the possible legal implications of racial discrimination claims by resident, as opposed to non-resident, minorities, and the possible legal distinctions between municipal conduct that results in maintaining total exclusion of minorities and similar conduct that maintains confinement of resident minorities to ghetto areas of the community.

Finally, considering this case together with *Arlington Heights* will enable this Court to examine the ap-

plicability of an important legal principle expressed in an earlier Supreme Court decision. *Gaston County* v. *United States,* 395 U.S. 285 (1969). *Gaston County* was a voting rights case in which this Court refused to permit a county to reinstate a literacy test, on grounds that blacks had received inferior educations under the segregated school system and would, therefore, be adversely affected. This Court held that one governmental body could not engage in conduct that is otherwise racially neutral if the effect perpetuates racial discrimination engaged in by others.

In *Skilken* and *Arlington Heights* the defendant municipalities both are racially segregated. In each case, the residential segregation is not fortuitous, but the result, in large part, of past practices of housing discrimination, engaged in by various private and public parties. Also in each case, the challenged conduct, while neutral on its face, results in a perpetuation of the residential segregation. Consideration of *Skilken* and *Arlington Heights* simultaneously will enable this Court to examine and determine the application of the principles of *Gaston County* to fair housing cases. Specifically, the Court will be in a position to determine whether the principles of *Gaston County* apply to facially neutral conduct that perpetuates past housing discrimination, and, if so, the application of those principles to discrimination emanating from a variety of private parties and governmental officials.

In short, Petitioners submit that the complementary relation of *Skilken* to *Arlington Heights* argues for granting the Petition in the instant case so that the Court, through examination of both, will be in a position to evaluate fully and resolve the important common issues that the two cases present.

III. Inconsistency With Prior Decisions of This Court

This Petition also presents for review the question whether a federal district court, after a finding of unlawful housing discrimination by municipal officials, may order those officials to develop a remedial plan to correct the effects of such discrimination. The Court of Appeals held that the district court had no authority to enter an affirmative action decree in which the defendants would be required to develop a remedial plan to correct the effects of their past misconduct. While recognizing that such orders are common to "school desegregation cases," A. 32a, the Appellate Court ruled they have no place in housing discrimination cases involving public officials.

The holding of the Court of Appeals is inconsistent with the prior decisions of this Court. For at least ten years, this Court has approved broad, remedial decrees in racial discrimination cases. When Louisiana officials objected to a decree requiring affirmative steps to correct the effects of their voting discrimination, the Supreme Court stated, in oft-quoted language:

> [The district court] has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

In that case, the Court approved a mandatory injunction requiring officials to undertake a number of affirmative remedial measures.

After its initial application in the voting field, this Court extended the concept of affirmative decrees to

other areas of racial discrimination.[21] In *Green* v. *County School Board,* 391 U.S. 430 (1968), this Court rejected the contention of the defendant school board that only a general, prohibitory injunction is authorized in school desegregation actions. In holding that it is not sufficient for school officials merely to stop discriminating, the Court stated that school boards have "the affirmative duty" to eliminate the last vestiges of discrimination, "root and branch." *Id.* at 438. This Court reaffirmed that ruling in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

In disapproving the district court's application of the remedial order doctrine to this housing case, the Court of Appeals ignored the contrary decisions of this Court.[22] Federal courts of appeals, following the prior decisions of the Supreme Court, have uniformly approved remedial orders which affirmatively seek to remedy housing discrimination. E.g., *Crow* v. *Brown, supra; MHDC* v. *Arlington Heights, supra; Kennedy Park Homes Ass'n* v. *City of Lackawanna, supra; Gautreaux* v. *Chicago Housing Authority,* 503 F.2d

[21] This Court, to be sure, has not limited the mandatory injunction with affirmative steps to civil rights cases. It has authorized broad remedial orders in a variety of circumstances. *See Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (fair labor standards); *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946) (price control); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189-190 (1944) (anti-trust).

[22] Indeed, in an employment discrimination case, the Sixth Circuit itself held that the findings "require vacation of pro forma judgment entered by the District Judge and remand for consideration of appropriate affirmative relief." *United States* v. *IBEW, Local 38,* 428 F.2d 144, 151 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970).

930 (7th Cir. 1974), *cert. granted sub nom. Hills* v. *Gautreaux,* 419 U.S. 962 (1975).[23]

Finally, it should be noted that the precise contours of a remedial order are not at issue. Because of the appeal, the district court has not yet entered a specific remedial order. Thus, the only issue before this Court now is the authority of a district court to enter any remedial order involving an affirmative action plan to correct the discriminatory effects of the past.

CONCLUSION

Because the decision of the Court of Appeals conflicts in important respects with the judgments of at least four other courts of appeals and because it is inconsistent with the prior decisions of this Court, the Petition for Writ of Certiorari should be granted and the case brought here for review, to be heard with

[23] In *Gautreaux,* this Court is reviewing the equity authority of federal courts to order a federal defendant, found to have practiced housing discrimination, to develop a remedial order which extends beyond the geographical area of the proved violation. That part of the remedial order that is applicable to the City of Chicago, where the violation occurred, is not at issue. In *Skilken,* the remedial plan would apply only to the City of Toledo, the geographical area where the violation occurred.

Metropolitan Housing Development Corp. v. *Village of Arlington Heights, supra.*

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January 15, 1976

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 74-202

MEMORANDUM

JOSEPH SKILLKEN AND COMPANY, ET AL, *Plaintiffs*,

VS.

CITY OF TOLEDO, ET AL., *Defendants*.

YOUNG, J:

(FILED AUGUST 28, 1974)

I. INTRODUCTION

This suit is instituted pursuant to several enactments within Title 42 of the United States Code. The specific sections are 1401, *et seq.*, 1441, *et seq.*, 1981, 1982, 1983, 2000d, and 3601, *et seq*. The action is also based upon the Thirteenth and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343; 42 U.S.C. § 3612 and 3617. The plaintiffs are: Joseph Skillken Company (hereinafter Skillken) a corporation engaged in the development and construction of residential dwelling units; Toledo Metropolitan Housing Authority (hereinafter TMHA); and low income minority persons on behalf of themselves and all other low-income minority residents who seek the opportunity to live in decent, safe, and sanitary housing in the City of Toledo, outside areas of minority concentration.[1] There are numerous defendants in

[1] An initial determination was made at a pretrial conference conditionally certifying the action as a class action with the class being tentatively determined as including all low income minority

this lawsuit and they appear as follows: The City of Toledo, (hereinafter city), a body corporate and politic, established and organized under the laws of the State of Ohio; Mayor Kessler, duly elected Mayor of the City of Toledo and as such the Chief Executive Officer of the City and a member of the Council of the City; Defendants Cook, Copeland, Daoust, Douglas, Galvin, Nies, Pietrykowski and Reddish, the duly elected Council members of the City of Toledo; Defendant Toledo City Plan Commission (hereinafter Commission), a commission established and organized under the laws of the State of Ohio, § 3735.27 *et seq.* Ohio Rev. Code, and the City of Toledo. The Commission's duties include the responsibility to review requests for rezoning and platting and to ensure their compliance with the Toledo zoning ordinances and subdivision regulations. Defendants Burke, Cook, Martin, Schimmel and Stoepler, are members of the Commission appointed pursuant to the law of the State of Ohio and the City of Toledo.

II. Background

On August 12, 1968 the City and TMHA entered into a Cooperation Agreement which provides in paragraph nine:

> So long as any contract between the Local Authority and HUD for loans, (including preliminary loans) or both in connection with any Project remains in force and effect, or so long as any bonds issued in connection with any Project or any monies due to HUD in connection with any Project remain unpaid, this Agre ment shall not be abrogated, changed, or modified without the consent of HUD. The privileges and obligations of the Municipality hereunder shall remain in full force and effect with respect to each project so long as the beneficial title to such Project is held by the Local Authority or by any public body or governmental agency, including HUD, authorized by law to engage in the development or administration of low-rent housing projects. If at any time the beneficial title to, or possession of, any Project is held by such other public body or governmental agency, including HUD, the provisions hereof shall inure to the benefit of any may be enforced by, such body or governmental agency, including HUD.

persons residing in the Toledo Metropolitan area who, by virtue of their race and poverty, are unable to secure decent, safe and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (T.M.H.A.), and who are eligible for the Turnkey III Housing program.

Furthermore, the agreement contains no provision which can be construed to give the City power to approve or disapprove sites selected for low-rent housing projects by TMHA. To meet its obligations under the Cooperation Agreement, TMHA sought and received a reservation of funds from HUD for the construction of 150 single family housing units under the Turnkey III Program.[2] Accordingly, TMHA advertised for proposals on the 150 units and Skillken responded to the advertisement by submitting a proposal to TMHA for the construction of 140 units of single family housing. Skillken's proposal was accepted by TMHA and a letter designating Skillken as the Turnkey developer was issued by Carl Barrett, Director of TMHA. Thereafter discussions between Skillken, TMHA and the Commission's staff resulted in choosing three sites upon which to build the proposed public housing units. Skillken then entered into option contracts for the acquisition of real property to build: 50 units of public housing on the Heatherdowns Boulevard site (hereinafter Heatherdowns); 46 units of public housing on the Holland-Sylvania Road site (hereinafter Holland-Sylvania); and 34 units of public housing on the Stateline Road-Lewis Avenue site (hereinafter Stateline). In December 1973,

[2] See plaintiff's exhibit 40.

Skillken sought approval from the Commission for the preliminary platting of the three proposed sites.[3] Simultaneously, Skillken petitioned the Commission for a rezoning of the Heatherdowns site to permit construction of single-family low-income housing on lots of smaller dimension than the existing zoning provides. This was not required for the Holland-Sylvania and the Stateline sites since the existing zoning accommodated Skillken's proposals. The Commission's staff recommended to the Commission that it approve Skillken's requests with regards to the rezoning of the Heatherdowns site and the preliminary platting for all three sites. On January 24, 1974 the Commission approved the plat for the Holland-Sylvania site. Subsequently it was revealed that Skillken's development was intended for public housing.[4] This led to a series of events which culminated in the commencement of this lawsuit. On March 7, 1974 the Commission rejected Skillken's petitions for the platting of the Stateline and Heatherdowns sites and also for the rezoning of the Heatherdowns site. After reviewing the Commission's action on rezoning the Heatherdowns site, the Toledo City Council preliminarily denied Skillken's request for rezoning on March 19, 1974. On March 21, 1974 the Commission rescinded its earlier approval of the preliminary platting for the Holland-Sylvania site. On March 26, 1974, City Council finally and formally rejected Skillken's request for rezoning of the Heatherdowns site by passage of Resolution 1-74.

[3] Technically, the laws make no provisions for preliminary platting approved by the Commission. However, the development of a legal plat is a very complicated and expensive business. A practice has been established by the Commission under which a developer could secure approval for a preliminary plat before going to the expense of preparing a complete plat. Whatever conditions the commission required in order to approve the preliminary plat could then be met in the final plat, and the approval of that plat would be merely a formal matter.

[4] The testimony of Mr. Suchan, Deputy Director of the Toledo Lucas County Plan Commission, and Mr. Willard Jacquot, Principal Planner of the Toledo Lucas County Plan Commission did not indicate that there was any subterfuge in not revealing that the proposed sites were for public housing. Rather the Commission's staff believed that their responsibility was to ensure that the proposals would meet the technical requirements for platting and whether the housing was public or private would not play a significant role in making that determination.

The plaintiff's filed this action on May 28, 1974. At the request of the plaintiffs and because of its importance, not only to the parties involved but also to the community, the case was expedited for an early hearing which the Court scheduled for July 15, 1974. The defendants subsequently requested a trial by jury which the plaintiffs opposed. The Court without ruling upon defendant's right to a trial by jury, bifurcated the trial so that the issue of injunctive relief would be heard to the Court without a jury pursuant to *Curtis* v. *Loether,* 94 S. Ct. Rptr. 1005 (1974).[5] After ruling upon various preliminary matters,[6] the hearing upon plaintiffs' request for declaratory and permanent injunctive relief commenced on July 15, 1974, and continued, with interruptions on July 18, into the morning of July 19, 1974.

III. Housing

The City of Toledo, according to the 1970 census, had a population of 383,818 persons; 329,068, or approximately 86%, were white; 52,915, or approximately 14% were black; and 1,835, or less than 1% were of other minority groups. It quickly became apparent from the testimony of various witnesses and the statistical evidence submitted that the

[5] *See* Pretrial Order filed July 3, 1974.

[6] Among the Court's rulings were denials of motions to intervene filed by both plaintiff-applicants, see Memorandum and Order filed July 1, 1974, and defendant-applicants. See Memorandum and Order filed July 8, 1974.

City of Toledo is a racially segregated city with minority groups [7] heavily concentrated in limited sections of the City known as the "Southwest Corridor," or the "Black Corridor." [8] The forces which brought about this segregated housing pattern were many. Among them were a policy of channeling or steering white prospective buyers away from black neighborhoods by real estate agents. Blacks also encountered far greater difficulty in obtaining financing for homes than their white counterparts. Unfortunately, the record very clearly shows that these forces are still at work with the effect of creating *de facto* segregation not only in housing but also in the racial composition of the public schools in the City.[9]

Past public housing projects were, until very recently, consistently placed in areas adjacent to already highly concentrated minority housing further adding to the segregated pattern. TMHA and the Commission's Staff, in an attempt to change that policy and scatter public housing projects throughout the City, cooperated with Skillken in selecting three sites which they believed would accomplish

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[7] In referring to minority groups the Court intends to include in this designation such races, creeds and national origins as are normally so indicated including specifically Black Americans, American Indians, Orientals and individuals with Spanish surnames.

[8] See plaintiffs' exhibit 165, a 1970 Toledo Urban Area Census Tract Map, illustrating the racial composition of the City of Toledo; and plaintiffs' exhibit 170, a "Black" Map illustrating the percent of blacks living in any one block of the City of Toledo.

[9] The City of Toledo school system is classified as a "neighborhood school concept." As a result of the segregated housing pattern in the City there is great disparity in the racial composition of both elementary schools, compare Longfellow: Minorities—10, Whites—1,106 to Lincoln: Minorities—893, Whites—0, and high schools, compare Bowsher: Minorities—50, Whites—1,777 to Scott: Minorities—2,183, Whites—60. See plaintiff's exhibits 67-69.

this purpose. The Heatherdowns site,[10] the Stateline site [11] and the Holland-Sylvania [12] site are all located in areas where there is 0-2% minority population. Furthermore the sites would be scattered in distinct sections of the City: Heatherdowns in the southwest corner, Holland-Sylvania in the west and Stateline in the north. The testimony very clearly showed that given the presently existing and quite limited availability of land in the City, the sites could not be scattered more. The records of the hearings before the Commission and the Council are a sad display of bigotry, intolerance and selfishness at its worst. With a great, but totally hyprocritical, show of piety, public officials and neighboring property owners pretended that to develop groups of dwellings would only create new ghettoes and that acceptable minority housing can only be obtained by building or buying individual houses throughout the city, or better still, by going out into the suburbs or rural areas beyond the city. The evidence in this case leaves no doubt that the actions and attitudes which have created segregation in Toledo are so strong and so persistent that only very positive court action can change the present housing patterns. The housing that was proposed for these sites would be under HUD's Turnkey III Program, which provides that the public housing be constructed for single-family dwelling units with potential ownership by the resident. The prospective residents would be selected by TMHA from its eligibility lists. Presently 70% of the families liv-

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[10] The high school which serves that area is Maumee High and the racial composition as of 1973 was: Minorities—32, Whites—1,333. Plaintiffs' Exhibit 71.

[11] The high school which serves that area is Whitmer High and the racial composition as of 1973 was: Minorities—20; Whites—2,935. Plaintiff's Exhibit 70.

[12] The high school which serves that area is Rogers High and the racial composition as of 1973 was Minorities—332, Whites—1,986. Plaintiffs' Exhibit 69.

ing in TMHA family projects are minorities.[13] Furthermore, approximately 70% of the people on the waiting list for Turnkey III housing are minorities and approximately 50% of the total minority population in the City are eligible for public housing.[14] The inescapable conclusion that must be drawn from these statistics is that decisions regarding public housing disproportionately effect minority groups since they comprise the vast majority of people who qualify for such housing.

IV. Initial Determination of Discrimination

The primary emphasis of the plaintiff's lawsuit is not grounded upon a claim of a denial of a fundamental right to decent housing, *Lindsey* v. *Normet*, 405 U.S. 56 (1972) or upon a claim of discriminatory treatment engendered by suspect wealth classification, *San Antonio* v. *Rodriguez*, 411 U.S. 1 (1973). Instead, the plaintiffs contend that the defendants' decisions to reject the proposed housing sites were racially motivated. This is a serious charge, and one that this Court has grappled with in many forms. See *Afro-American Partolmen's League* v. *Duck*, 366 F. Supp. 1095 (N.D. Ohio 1973). And although it has been a score of years since the federal judiciary cast aside any doubts that racial discrimination would not be tolerated, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the subtleties that have been refined and developed to perpetuate discriminatory practices require that the judiciary continue to scrutinize all decisions of public or private organizations involving the likelihood of discrimination and intervene postively when necessary to create and promote equality. There can no longer be any question that under our Constitution distinctions in treatment based upon race are inherently suspect. *Brown* v. *Board of Education*,

[13] Plaintiffs' Exhibit 60.

[14] *Id.* and plaintiffs' Exhibit 61.

supra; McLaughlin v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967).

Furthermore, Congress has continued to expand the protection of individual rights by the passage of the Fair Housing Act. As stated at the outset of this legislation, it was enacted to ensure a "policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" 42 U.S.C. §3601. Similar to the 1866 Civil Rights Act, this legislation passed as Title VIII of the Civil Rights Act of 1968, is a congressional exercise of power under the Thirteenth Amendment to eliminate the badges and incidents of slavery. The United States Supreme Court recognized this by stating, when reviewing an action under 42 U.S.C. §1982, that:

> [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. *Jones* v. *Mayer Co.*, 392 U.S. 409, 442-43 (1968).

Therefore Title VIII and Civil Rights Act of 1866 together comprehensively spell out the right of an individual to rent or purchase housing without suffering discrimination and to obtain federal enforcement of that fundamental guarantee. *Jones, supra.* As stated by the United States Court of Appeals for the Eighth Circuit in *Williams* v. *The Matthews Co.*, No. 73-1765 (8th Cir. filed June 20, 1974):

> Recent cases make clear that the statutes prohibit all forms of discrimination, sophisticated as well as simple-minded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hinderance, and special treatment must receive short shrift from the courts. *See United States* v. *Pelzer Realty Company, Inc.*, 484 F.2d 438 (5th Cir. 1973); *United States* v. *Youritan Construction Company*, No. C-71 1163 ACW (N.D. Cal., filed Feb. 8, 1973); *Hall* v. *Freitas*, 343 F. Supp. 1099 (N.D. Cal. 1972); *Newbern* v. *Lake Lorelei, Inc.*, 308 F. Supp. 407

(S.D. Ohio 1968); *Brown* v. *Lo Duca,* 307 F. Supp. 102 (E.D. Wisc. 1969).

Race is an impermissible factor in real estate transactions under both 42 U.S.C. §1982 and 42 U.S.C. §3604 and "cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination." *Smith* v. *Sol D. Adler Realty,* 436 F.2d 344, 349-350 (7th Cir. 1970). The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination irrespective of defendant's motivation. *See United States* v. *Grooms,* 348 F. Supp. 1130, 1133-1134 (M.D. Fla. 1972); *United States* v. *Real Estate Development Corporation,* 347 F. Supp. 776, 782 (N.D. Miss. 1972); *United States* v. *Reddock,* No. 6541-71-P (S.D. Ala. filed Jan. 1, 1972), aff'd, 467 F.2d 897 (5th Cir. 1972).

On this basis the Court finds that the concept of the "prima facie case" under the Civil Rights Act of 1866 is further augmented by the Fair Housing legislation and applies to discrimination in housing as much as to discrimination in other areas of life.

In reviewing the record in this context the Court finds that in the past recommendations by the Commission's Staff with regards to platting were normally approved.[15] Mr. Cline, member of the Commission since 1937, Chairman since 1941 and at the time the three site proposals were rejected, could not recall any specific incidents when the Commission's Staff recommendations were not approved but seemed to remember it occurring once about 10 to 15 years ago. It is notable that although he had had ample opportunity before the trial to research the records of the Commission he could not offer dates or occasions but only vague recollections. The Court is forced to conclude that there really never were any previous instances of the

[15] The Commission's Staff recommended approval of the platting of all three sites and also the rezoning of the Heatherdowns site.

Commission doing what it did here. The record is also replete with rezoning changes in the Heatherdowns area from R-A to various other residential and commercial uses. The present zoning for this area was frequently referred to as in a "holding status" with rezoning contemplated in the near future. Furthermore when specifically asked if the rescission of the Holland-Sylvania's platting would have occurred if the development were not designated for public housing, Mr. Cooke, present Chairman and then member of the Commission, answered: "Probably not. I think that's inescapable. Probably not."[16] When the fact that the majority of people who are presently living in public housing are members of minority races is coupled with the fact that the majority of persons who are eligible and waiting for public housing are also members of minority races, the conclusion that any discussion of public housing has racial overtones is unavoidable. In this light and based upon the overwhelming evidence introduced, the Court finds, notwithstanding the attempts by the City to defend its actions, that the plaintiffs have clearly and convincingly met their burden of establishing a case of racial discrimination on the part of the City. *Burton* v. *Wilmington Park Authority,* 365 U.S. 715 (1961); *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *United States* v. *Pelzer Realty Company,* 484 F.2d 438 (5th Cir. 1973); *Hawkins* v. *Town of Shaw,* 461 F.2d 1171 (5th Cir. 1972); *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2nd Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970); *Banks* v. *Perk,* 341 F.Supp. 1175 (N.D. Ohio 1972) *aff'd in part, rev'd in part* 473 F.2d 910 (6th Cir. 1973).

[16] Defendants Exhibit AY, Deposition of Stratman Cooke at page 63.

V. Justification for Discrimination

Once the existence of a racially discriminatory effect is proven, the burden shifts to the defendants to demonstrate that the discrimination was necessary to promote a compelling governmental interest. *In re Griffiths,* 413 U.S 717 (1973); *McLaughlin* v. *Florida, supra; Loving* v. *Virginia, supra; Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

The City suggests a number of reasons to justify its actions and to meet the "compelling interest" test.

A. *TMHA*

The City first argues that the past housing projects that TMHA has supervised or been involved with have proven to be failures. Further, that TMHA has not worked closely with the City or Commission in developing public housing. The Court can take judicial notice of the fact that TMHA-involved projects have encountered difficulties. See *Markowitz* v. *TMHA,* Civil No. 70-268 (N.D. Ohio Memomandum filed April 25, 1973). However, the City's mere assertion cannot justify its actions. The City as an equal partner with TMHA is also charged with the responsibility of developing an integrated housing pattern for the community. The Mayor has a direct input with TMHA for he selects the persons who serve as members of TMHA's Board of Directors. No evidence was submitted to show that the City attempted to prod TMHA to become a more effective organization or that TMHA spurned the City's efforts in that direction. Rather, it can only be concluded that if there were a demise of TMHA as a responsible entity, the City idly watched it occur. The evidence submitted does not support the City's contention that TMHA has not worked closely with it. The testimony of the Commission's Staff indicated that there was a close and cooperative working relationship between staffs of both organizations. Further, the failure of TMHA to appear at the Commission's and Council's hearings on the proposals for these sites may be attributed to the fact that neither the Commission nor the Council ever requested members of TMHA to appear. The defendants cannot merely shift the blame to another governmental organization because of that organization's lack of cooperation and efficiency when it is evident that the defendants failed to show any initiative either. There is some indication that the members and employees of TMHA justified their failure to involve themselves in the Commission and City proceedings in this matter because under its reading of the housing laws, all responsibility in this area is imposed upon Skillken. This example of bureaucratic ducking is typical of TMHA's pusillanimous approach to its responsibilities.

B. *Neighborhoods*

The Heatherdowns site is presently zoned R-A (20,000 sq. ft. lots). In order that the proposed public housing be constructed at this site a rezoning to R-1 (9,000 sq. ft. lots) or R-2 (6,000 sq. ft. lots) was required. City Council and the Commission attempted to justify rejecting the proposals on the grounds it was not beneficial for the neighborhood. It appears that specific reference is made to Ragan Woods, a housing development across what will eventually be a four lane divided highway from the proposed site. Ragan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-A. However, the record also shows that this area has been frequently rezoned from the initial R-A to other types of residential and commercial uses.[17] The City's explanation for denial of the rezoning is consequently no real explanation at all when viewed in these terms. At most, it is an excuse and a very poor one. It seems to this Court to be completely illogical

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[17] Plaintiffs Exhibits 85-103.

to contend that rezoning to other residential and commercial uses can be beneficial to the neighborhood yet the plaintiff's requested rezoning would be harmful, unless it be *conceded that having poor or* minority persons in the neighborhood is harmful, and may legally be forbidden. As stated in *Banks* v. *Perk, supra* at 1180 citing from *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970):

> "[I]f proof of a civil right violation depends on an open statement by an official of intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." 425 F.2d at 1039. Therefore in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination especially in public housing, cannot be tolerated.

A similar "neighborhood" defense is made with regards to the denial of the Stateline site and the rescission of the Holland-Sylvania site. Similarly the Court disposes of those defenses for the reasons enunciated above.

C. *Technical Requirements*

The defendants argue that the Stateline site proposal was properly rejected because there was evidence of "fill" and that the land is subject to flooding. Mr. Cline supported these contentions by referring to photographs shown to him by Mrs. Burke, a woman who had lived in the area for over fifty years. These photographs showed that there was water on the land at one time. However, according to the testimony of Mr. Huber, a registered professional civil engineer, the land was above flood level. Soil boring tests conducted on the site[18] demonstrated that what little old fill existed was shallow, and the building foundations would rest on undisturbed original soil. From all the evidence there appears to be no engineering reason why the proposed

[18] Plaintiffs Exhibits 15-18.

housing development cannot be constructed. No competent fact finder could properly have given any credence to the exaggerated and distorted memories of so unabashedly interested a witness as Mrs. Burke against the scientific evidence which contradicted it. To accept prejudiced lay testimony as showing an absence of compliance with technical requirements is so patently a subterfuge as to be totally unacceptable.

D. *Clustered Housing*

The City also argued that clustered housing may be fine theoretically but is lacking in a practical sense. Since the three proposed developments consist of small groupings of houses, the City submits it properly rejected them. Such an argument completely overlooks that clustered housing developments are not only rampant throughout the Toledo Community but throughout the United States. To contend that these proposals were properly rejected because they are clustered housing when over the years the Commission and the City have dutifully approved platting and rezoning for other clustered housing developments in every section of the city, is nonsensical. For what distinguishes the Skillken proposed clustered housing from the already existing clustered housing developments other than the potential residents? This argument is particularly offensive when it is applied to the Heatherdowns site. Is Ragan Woods any less clustered because the lots and the prices are twice as big as Skillken proposes? The appalling cluster of the adjacent Southwyck development, shown on the exhibits in evidence, totally demolishes this argument.

E. *Justification Lacking*

In the instant case, as in the *Lackawanna* case, the plaintiffs seek "to exercise their constitutional right of 'freedom from discrimination by the States in the enjoyment of property rights.' *Shelley* v. *Kraemer,* 334 U.S. 1, 20 (1948). The effect of the City's action is inescapably adverse to the

enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality." *Lackawanna, supra* at 114.

After a complete review of the record, the Court cannot find that the City has even come close to meeting its burden. The justifications the City tenders are devoid of the requisite "compelling" nature. When viewed in the light of past practices of the City they lack merit and are transfigured into vain, albeit subtle, attempts to veil racially motivated decisions. The Court cannot be swayed by what the City articulates [19] when the effect of its decisions are discriminatory. The Constitution does not permit, and therefore this Court cannot permit, unjustified racial discrimination.

VI. Mahaley

The defendants at numerous junctures argued that the instant case is governed by the holding of *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* No. 73-1407 (6th Cir. filed July 9, 1974). This Court finds it clearly distinguishable. In *Mahaley* the Court of Appeals was asked to decide if a constitutional violation resulted when neighboring municipalities did not enter into cooperation agreements with the local housing authority and refused to consent to the construction of public housing units within their boundaries. The Court of Appeals held there was not

[19] Mr. Raymond Palmer, Acting Director of the Department of Community Development, testified in reference to plaintiffs' exhibits 81-83, that the City in applying for financial grants from HUD indicated that 150 housing units were scheduled for construction to provide homes for displaced persons. The Skillken housing developments were included within the 150 anticipated housing units. This creates a situation whereby the City seeks funds for construction of public housing and then turns around and rejects the proposals of the developer which would implement its stated policy.

a constitutional violation because the decision to enter into a Cooperation Agreement was within the discretion of the municipality. In the instant case, the City has previously entered into a cooperation agreement with the local housing authority (TMHA).[20] Further, this Court has found that the discriminatory housing pattern which has evolved in the City resulted from a prior pattern of discrimination and also that the City's actions fall more heavily upon minority group members than upon the population as a whole. *See Citizens Comm. for Faraday Wood* v. *Lindsay,* 362 F.Supp. 651 (S.D. N.Y. 1973). Although this Court is aware of the *Mahaley* admonitions, it does not find the *Mahaley* holding to be controlling upon the case before it.

VII. Conclusion

The Court is cognizant of the complex emotional problems that a case such as this presents. Appropriately, it reiterates the oft quoted words of Justice Day, writing for a unanimous Court, in *Buchanan* v. *Worley,* 245 U.S. 60, 80-81 (1917):

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

The evidence in this case demonstrates that this Court's conditional certifying of this matter as a class action was correct. Therefore, this action shall proceed as a class action, and the class of plaintiffs is hereby certified as including all low income minority persons residing in the Toledo Metropolitan area who, by virtue of their race and

[20] This Court has previously held when asked to review the Cooperation Agreement that it is binding upon the City. *See Davis* v. *City of Toledo,* Civil No. 70-157 (N.D. Ohio filed June 8, 1970).

poverty, are unable to secure decent, safe and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (T.M.H.A.), and who are eligible for the Turnkey III Housing Program.

The named plaintiffs are members of this class, and they have more than adequately represented the other members of the class.

As to this portion of the case, the Court finds that Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site, and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites are void and unenforceable.

The Court further finds that the plaintiffs are entitled to a permanent injunction restraining the defendants, their officers, agents, and employees, and any and all other persons acting in concert or participation with them:

(1) From enforcing Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions of the Toledo City Plan Commission in disapproving the rezoning and platting of the Heatherdowns Blvd., Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites;

(2) From failing to take all necessary steps to approve Skillken's request for platting approval on the Heatherdowns Blvd., Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites, and for rezoning the Heatherdowns Blvd. site;

(3) From engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race, color, religion, or national origin, or of interfering with the implementation and execution of federal housing programs, or of breaching the August 12, 1968 Cooperation Agreement; and

(4) From expending, or borrowing on any monies allocated to defendants City of Toledo or Toledo City Plan Commission by the U.S. Department of Housing and Urban Development, except for those funds directly related to hardship acquisitions and to the immediate rehabilitation and expansion of the low and moderate income housing supply in the City of Toledo until defendant have complied with (1), (2) and (3) above;

The Court further finds that the issues decided in this case involve controlling questions of law as to which there are substantial ground for difference of opinion and an immediate appeal would advance the ultimate termination of this litigation. Therefore the Court will permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

This matter is continued to a date to be fixed by the Court for a determination of the issue of damages for the plaintiff Skillken, and of the question of the request of the defendants to a jury trial upon this issue.

This memorandum will serve as the Court's findings of fact and conclusions of low. Plaintiffs may prepare and submit an order reflective of these findings and conclusions in accordance with the Local Civil Rules.

/s/ DON J. YOUNG
Don J. Young
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

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In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on October 8, 1974.

MARK SCHLACHET, Clerk

(CAPTION OMITTED IN PRINTING)

Civil No. C 74-202

ORDER

Pursuant to this Court's findings of fact and conclusions of law contained in its memorandum of August 28, 1974, the Court finds that it has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 3612 and 3617 and that this action is properly maintained pursuant to 42 U.S.C. §§1401, *et seq.*, 1441 *et seq,* 1981, 1982, 1983, 2000d, and 3601 *et seq.* and the Thirteenth and Fourteenth Amendments to the United States Constitution.

THEREFORE FOR GOOD CAUSE APPEARING, IT IS

I.

ORDERED that this action be and hereby is certified to proceed as a class action pursuant to Rule 23(a), (b)(1)(A)(B), and (2) of the Fed. R. Civ. P. with the class consisting of all low income minority persons residing in the Toledo Metropolitan Area who, by virtue of their race and poverty, are unable to secure decent, safe, and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (TMHA) and who are eligible for the Turnkey III Housing Program.

AND IT IS FURTHER

ORDERED that Sandra Hueston and Jose Maldonado are members of this class of plaintiffs and are adequate representatives of the class.

AND IT IS FURTHER

ORDERED and DECLARED that the passage of Resolution 1-74 by the Toledo City Council on March 26, 1974, in disapproving the rezoning of the Heatherdowns Boulevard site, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site, and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites, without any regard to the defendants' intentions or motivations, are and have the effect of being racially discriminatory, of perpetuating racial residential segregation, and that these actions deny plaintiffs and the members of their class equal housing opportunities and violate rights secured to plaintiffs under 42 U.S.C. §§ 1401, *et seq.*, 1441, *et seq.*, 1981, 1982, 1983, 2000d, aid 3601, *et seq.*, and the Thirteenth and Fourteenth Amendments to the United States Constitution, and constitute a breach of the August 12, 1968 Cooperation Agreement.

AND IT IS FURTHER

ORDERED and DECLARED that Resolution 1-74 passed by the Toledo City Council on March 26, 1974, and the actions taken by the Toledo City Plan Commission in disapproving the rezoning of the Heatherdowns Boulevard site and the platting of the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites are void and unenforceable.

THEREFORE IT IS

II.

ORDERED that the defendants Harry Kessler, Gene Cook, William Copeland, Pamela Daoust, Andrew Douglas, June Galvin, Ray Niles, Carol Pietrykowski and Max Reddish, adopt a resolution changing the zoning of the Heatherdowns Boulevard site (as defined in plaintiff Skillken's application for rezoning) from its present R-A zoning classification to R-1 zoning classification.

AND IT IS FURTHER

ORDERED that the defendants Richard Burke, Stratman Cooke, Robert Martin, Paul Schimmel and John W. Stoepler adopt resolutions giving approval to the preliminary plats submitted by Skillken for the Holland-Sylvania Road, Stateline Road-Lewis Avenue, and Heatherdowns Boulevard sites.

AND IT IS FURTHER

ORDERED that the defendants, their officers, agents, employees, and any and all other persons acting in concert or participation with any of them, be and they are hereby

PERMANENTLY ENJOINED:

A. From taking any action to enforce or give any effect whatever to Resolution 1-74 passed by the Toledo City Council in disapproving the rezoning of the Heatherdowns Boulevard site and the actions of the Toledo City Plan Commission in recommending the disapproval of the rezoning of the Heatherdowns Boulevard site and the actions of the Toledo City Plan Commission in disapproving the preliminary plats for the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites;

B. From failing to take all necessary and appropriate steps to approve the rezoning of the Heatherdowns Boulevard site to R-1 (9,000 sq. ft.) and the platting of the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites, and to approve the final plats for said sites as long as the same conform to and fulfill the descriptions, conditions and requirements of the preliminary plats, including the modification of the Heatherdown plat from R-2 toR-1 zoning.

C. From interfering with, delaying, failing to take, or refusing to take, all necessary and appropriate steps to ensure, facilitate, and expedite the development and construction of public housing on the Heatherdowns Boulevard, Holland-Sylvania Road, and Stateline Road-Lewis Avenue sites;

D. From engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race, color, religion, or national origin, or of interfering with the implementation and execution of Federal housing programs, or of interfering with or breaching the August 12, 1968 Cooperation Agreement.

AND IT IS FURTHER

III.

ORDERED that in order to eliminate the past and continuing effects of racial residential segregation, the defendants shall, after consultation with plaintiffs, submit to this Court within ninety (90) days after the entry of this order, a comprehensive plan whereby the defendant City of Toledo and Toledo City Plan Commission, their members, officers, agents, employees, and all persons acting in concert and participation with them, shall affirmatively engage themselves in substantial efforts to eliminate discriminatory barriers in the total housing supply and make housing in a broad choice of neighborhoods freely and fully available to minority persons.

AND IT IS FURTHER

ORDERED that the following defendants' submission to the Court of the above plan, plaintiffs may submit to the Court within twenty (20) days thereafter any objections or alternative suggestions to such plan.

AND IT IS FURTHER

IV.

ORDERED that this Court's memorandum of August 28, 1974 is hereby modified to read as follows:

A. The name "Cook" as it appears on page 2 of the memorandum shall read "Cooke."

B. The sentence "Regan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-A" as it appears on page 11 of the memorandum shall read,

"Ragan Woods is comprised of homes valued in excess of $70,000 and presently zoned R-B."

C. The name "Raymond Palmer" as it appears on page 14 of the memorandum shall read "Wayman Palmer."

AND IT IS FURTHER

ORDERED that the issue of damages for the plaintiff Skilken and the request of the defendants for a jury trial upon this issue be continued to a date to be fixed by this Court,

AND IT IS FURTHER

ORDERED that this action involves controlling questions of law as to which there are substantial grounds for difference of opinion; that an immediate appeal would advance the ultimate termination of this litigation; and that an interlocutory appeal will be permitted pursuant to 28 U.S.C. § 1292(b).

AND IT IS FURTHER

ORDERED that plaintiffs shall receive their costs expended to date herein.

AND IT IS FURTHER

ORDERED that this Court shall retain jurisdiction over this matter for the entry of such further orders as may be appropriate to effectuate the provisions of this order.

ALL OF WHICH IS SO ORDERED.

/s/ DON J. YOUNG
Don J. Young
United States District Judge

Toledo, Ohio.

Nos. 74-2116 & 74-2320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-2116

JOSEPH SKILLKEN & Co., et al, *Plaintiff-Appellees,*

v.

CITY OF TOLEDO, et al, RAGAN WOODS HOMEOWNERS ASSOCIATION, *et al, Intervenor, Defendants-Appellants.*

No. 74-2320

JOSEPH SKILLKEN & Co., et al, *Plaintiff-Appellees,*

v.

CITY OF TOLEDO, et al, *Defendants-Appellants.*

APPEAL from United States District Court for the Northern District of Ohio, Western Division

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DECIDED AND FILED DECEMBER 10, 1975.

Before PHILLIPS, *Chief Judge,* WEICK, *Circuit Judge,* and MILES*, *District Judge.*

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* The Honorable Wendell A. Miles, Judge, United States District Court for the Western District of Michigan, sitting by designation.

WEICK, *Circuit Judge,* delivered the opinion of the Court, in which MILES, *District Judge,* joined. PHILLIPS, *Chief Judge,* (pp. 27-28) filed a separate concurring opinion.

WEICK, *Circuit Judge.* These two appeals were consolidated for oral argument.

They involve important questions of law in a low income public housing suit brought under 42 U.S.C. §§ 1401, *et seq.*, §§ 1981-1983, 2000d, *et seq.*, and §§ 3601, et eq., concerning the propriety of a mandatory injunction issued by the Distrist Judge commanding the governing body of the City of Toledo, Ohio, namely, the members of the City Council, to rezone by a spot zoning ordinance an area in the neighborhood of expensive residential property in the Ragan Woods Addition, which area had been zoned previously under Toledo's comprehensive zoning ordinance. The mandatory injunction also required the defendants to approve a preliminary plat for that area, and for two other areas of the city, all to accommodate the construction of one hundred forty-five Turnkey III low cost public housing units in said areas.

They further involve the propriety of the order of the District Court, not considered in its published opinion, requiring the City Council to submit to the Court, within 90 days, a comprehensive plan for the integration of the residential neighborhoods of the City of Toledo.

The property owners in the Ragan Woods Addition filed a motion to intervene as defendants in the suit against the municipal defendants, on the ground that to change the existing comprehensive zoning ordinance to accommodate the construction of low cost housing would depreciate substantially the values of their properties. The motion to intervene, together with a proposed answer to the complaint, was promptly filed within three days after the municipal defendants had filed their answers to the complaint.

The District Judge summarily denied the motion without even a hearing, the grounds for denial being that it was untimely filed, that the property owners did not have sufficient interest, and that they were adequately represented by counsel for the municipal defendants.

Appeals were taken to this Court by the property owners who were denied intervention in case number 74-2116, and by the municipal defendants in case number 74-2320.

The municipal defendants moved for a stay of the District Court's mandatory injunction pending appeal, which stay was granted by the District Court, but only on condition that the City of Toledo execute a supersedeas bond is the amount of $880,709.[1] The City promptly posted the bond.

The plaintiffs in the case were Joseph Skillken & Company (Skillken), a Columbus, Ohio corporation, engaged in the development and construction of residential housing units, Toledo Metropolitan Housing Authority (TMHA), Jose Maldonado and Barbara Talley, a Mexican American

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[1] Revised Code of Ohio, Sec. 2505.12 exempts the state and municipalities and their offices from giving bonds. See *Sharon Realty Co.* v. *Westlake*, 114 Ohio App. 421 (1961). Similarly, Rule 62(e) of the Fed.R.Civ.P. exempts the United States or its officers or agencies. 28 U.S.C. § 2408.

In *Marrow* v. *City of Ferguson*, 114 F.Supp. 755, 756 (E.D. Mo. 1953), *aff'd* 210 F.2d 520 (8th Cir. 1954), the District Court, under Missouri statutes similar to Ohio's, held that the statutes created substantive rights, not merely procedural, and dispensed with bond in an appeal.

Furthermore, the District Court had previously bifurcated the damage issues from the injunctive issues, and no damages had been awarded. The record does not disclose any question about the solvency of the City or its ability to respond in damages. It is not understandable, in any event, why such a high bond was required. The District Court even had discretion to issue the stay without any bond, in the absence of proof of likelihood of harm. *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964).

and a Negro, on behalf of themselves and other low income minorities living in Toledo, and who allegedly are in need of housing.

The defendants were the City of Toledo, its Mayor, and the individual members of its Plan Commission and City Council. Skillken and TMHA were each represented by their own attorneys. Maldonado and Talley were represented by the attorneys of Advocates for Basic Legal Equality and the National Committee Against Discrimination in Housing. The municipal defendants were represented by the Director of Law of the City and his assistants.

The City had entered into a co-operation agreement with TMHA on August 12, 1968.[2] TMHA sought and received a reservation of funds from the Department of Housing and Urban Development (HUD) for the construction of 150 units of single-family low-income housing units under the Turnkey III Program. TMHA thereafter advertised for proposals on the 150 units. Skillken responded to the advertisement by submitting to TMHA a proposal for the construction of 140 units of single-family housing. The proposal was accepted and a letter designating Skillken as the Turnkey III developer was issued by the Director of TMHA. Under the Turnkey III Program the developer is responsible for securing sites and obtaining all necessary zoning and platting approvals.

Following discussions among Skillken, TMHA, and staff members of the Plan Commission, three sites were chosen upon which to construct the proposed public housing units. Skillken then entered into option contracts for the acquisition of real property to build as follows:

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[2] The 1968 co-operation agreement superseded a previous co-operation agreement entered into in 1938, which was amended in 1940.

Under the 1938 agreement sites selected for low-rent public housing required consent of the City of Toledo. The 1968 agreement gave the City no such authority to approve sites. *Davis* v. *City of Toledo,* 54 F.R.D. 386 (N.D.Ohio, W.D. 1970).

50 units of public housing on the Heatherdowns Boulevard site (hereinafter Heatherdowns);

46 units of public housing on the Holland-Sylvania site (Holland-Sylvania); and

34 units of public housing on the Stateline Road-Lewis Avenue site (Stateline).

In December, 1973 Skillken requested approval from the Plan Commission for the preliminary platting of the three proposed sites. Simultaneously Skillken petitioned the Plan Commission for a rezoning of the Heatherdowns site from an R-A residential classification of 20,000-square foot lots to an R-2 residential classification of 6,000-square foot lots, which would permit construction of fifty single-family low income housing units on lots of much smaller dimension than authorized by existing zoning. Zoning changes were not required for the Holland-Sylvania or Stateline sites, since existing zoning accommodated the proposals.

On January 24, 1974 the Plan Commission's staff conditionally recommended, and the Plan Commission accepted, the preliminary plat for the Holland-Sylvania site.[3] During this meeting consideration was given to the preliminary platting of the Stateline site, but action was deferred until February 7, 1974 when the Plan Commission met to consider the preliminary platting of the Stateline and Heatherdowns sites.

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[3] Preliminary platting is required under the Subdivision Rules and Regulations of the City of Toledo. Ohio Revised Code makes no provision for preliminary platting. Because the development of a legal plat is complicated and expensive the Plan Commission established a practice under which a developer may secure approval for a preliminary plat before going to the expense of preparation of a complete plat. Whatever conditions the Commission might require in order to approve the preliminary plat could then be met in the final plat.

Prior to this time the Plan Commission was unaware that public housing was to be constructed on the sites because the staff had neglected to advise it of that fact.

Residents from these areas attended the meeting and voiced strong disapproval of the construction of public housing units because of the potential water drainage problems that higher density dwelling units would cause. Additional objections will be discussed later in this opinion.

The Plan Commission deferred action until its March 7, 1974 meeting, at which time it rejected Skillken's petition for the platting of the Stateline site on the basis that "[I]t is not in the best interests of the residents in that area . . ." The Plan Commission also rejected the petition for platting and the request to rezone the Heatherdowns site for the reason that "[T]he subdivision as presented . . . does not meet the area requirements for the zoning. . . ."

Following this action by the Plan Commission the Toledo City Council preliminarily denied Skillken's request to rezone the Heatherdowns site on March 19, 1974. On March 21, 1974 the Plan Commission rescinded its prior approval for the Holland-Sylvania site, and on March 26, 1974 the Council formally rejected Skillken's request for rezoning the Heatherdowns site by passage of Resolution 1-74.

On May 28, 1974 the plaintiffs filed the present suit.

They sought a mandatory injunction to compel the members of the City Council of Toledo to rezone and plat the Heatherdowns site and to approve a plat for the Holland-Sylvania and Stateline sites so as to permit the construction of 130 low cost public housing units on said sites.

It was alleged that the action of the City Council and the Plan Commission was racially motivated by intentional and purposeful discrimination against black people who were in need of public housing.

The District Judge in his published opinion found a purposeful and intentional discrimination against black people on the part of the City Council and the Plan Commission, and directed counsel for plaintiffs to prepare an order granting relief to the plaintiffs.

The order, which was approved by the Court and entered on October 8, 1974, however, substantially deviated from the Court's published opinion. It provided that the defendants' acts—

> . . . without any regard to the defendants' intentions or motivations, are and have the effect of being racially discriminatory, of perpetuating racial residential segregation and that these actions deny plaintiffs and the members of their class equal housing opportunities. . . .

Thus, "in effect" discrimination was added, whereas the previous ground was purposeful and intentional discrimination, which was not proved.

But this was not all. The entire nature of the case was changed by the following order (which was not in the published opinion):

AND IT IS FURTHER

III

ORDERED that in order to eliminate the past and continuing effects of racial residential segregation, the defendants shall, after consultation with plaintiffs, submit to this Court within ninety (90) days after the entry of this order, a comprehensive plan whereby the defendant City of Toledo and Toledo City Plan Commission, their members, officers, agents, employees, and all persons acting in concert and participation with them, shall affirmatively engage themselves in substantial efforts to eliminate discriminatory barriers in the total housing supply and make housing in a broad choice of neighborhoods freely and fully available to minority persons.

AND IT IS FURTHER

ORDERED that following defendants' submission to the Court of the above plan, plaintiffs may submit to

the Court within twenty (20) days thereafter any objections or alternative suggestions to such plan.
(A. 64-65)

These provisions were patterned after orders in school desegregation cases. They actually ordered integration of the residential neighborhoods of the entire city of Toledo, by means of low cost public housing, at public expense, and irrespective of zoning ordinances.

I.

The Attempted Intervention
Appeal No. 74-2116

As before stated, the motion to intervene was filed within three days after the answer to the complaint was filed by the municipal defendants.

The motion was filed by four individual property owners and by the Ragan Woods Homeowners Association, representing about 140 owners of property in the Ragan Woods Subdivision, who are members of this class. The motion stated that there are questions of law and fact common to the class.

The common question of law and fact is the propriety of the actions of the municipal defendants in disapproving the requested rezoning and plat proposals for the Heatherdowns site referred to in the complaint.

The motion further stated that as neighboring property owners they would be damaged by the proposed zoning and that they have rights and interests protected by statute and are entitled to intervene as a matter of right. They state that disposition of the present suit may impair or impede their ability to protect their interests. They also assert that they have a permissive right to intervene as shown by their proposed answer to the complaint, a copy of which was attached to the motion to intervene.

In their answer the intervenors state among other things that the Heatherdowns Boulevard site was zoned R-A for single-family residences, with minimum lot areas per family of 20,000-square feet and minimum lot width of 100 feet.

It is alleged that this zoning was proper and conformed to the most desirable, appropriate, and best use of the property affected thereby at the time it was zoned.

They allege that the individual property owners and the class they represent have expended over $10,000,000 in development of their respective properties in reliance on the existing zoning ordinances, and since said zoning there has been no zoning change of any part of the Ragan Woods-Heatherdowns area to R-2, 6000-square foot lots, as requested by plaintiffs and denied by the co-defendants.

They allege that the proposed zoning change would constitute "spot zoning", and that as a result the intervenors and others will suffer great deterioration and diminution in value of their respective properties, and that they will be irreparably damaged, for which they have no adequate remedy at law.

Since the District Judge summarily denied the motion to intervene without a hearing and without taking evidence, we must assume that the factual allegations in the motion and in the accompanying answer are true.

Intervention as of right is governed by Rule 24(a) of the Federal Rules of Civil Procedure, which provides:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervent in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to

protect that interest, unless the applicant's interest is adequately represented by existing parties.

In our opinion the District Judge erred in ruling that the application to intervene was untimely. It was filed within only three days after the municipal defendants had answered. Discovery had just been started. Counsel for the intervening petitioners had indicated that he would not ask for any delay in the expedited trial.

In *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C.Cir. 1944), intervention was permitted even after judgment in order to permit an adjoining property owner to appeal in a suit brought to enjoin enforcement of a zoning order which affected the value of adjoining property, and the Zoning Commission had decided not to appeal from an adverse judgment of the District Court.

We also note that without permitting the neighboring property owners to intervene and protect their property rights, the District Judge in his Memorandum Opinion commented on their conduct, as well as that of the public officials who are the defendants, stating:

> The records of the hearings before the Commission and the Council are a sad display of bigotry, intolerance, and selfishness at its worst. With a great, but totally hypocritical, show of piety, public officials and neighboring property owners pretended that to develop groups of dwellings would only create new ghettos and that acceptable minority housing can only be obtained by building or buying individual houses throughout the city, or better still, by going out into the suburbs or rural areas beyond the city. The evidence in this case leaves no doubt that the actions and attitudes which have created segregation in Toledo are so strong and so persistent that only very positve court action can change the present housing patterns.
>
> (380 F.Supp. at 231)

Thus the Mayor of Toledo, the members of the City Council and the Plan Commission are all tarred with "bigotry, intolerance, and selfishness at its worst." The public officials and the neighboring property owners who were attempting to protect their properties from serious diminution in value were branded as hypocrites feigning a show of piety.

Rule 24(a) requires that the applicant claim an interest relating to the property or transaction which is the subject of the action.

The change in zoning was from lots of 20,000 square feet with 100 feet frontage, to lots of only 6,000 square feet. This would permit the construction of fifty low cost homes in a neighborhood where homes costing from $75,000 to $100,000 have been built. The motion to intervene alleges facts which have not been contradicted that the change in the zoning law will result in a serious and substantial diminution of value of the properties in the Ragan Woods Subdivision.

We look to the law of Ohio for guidance as to the rights of property owners who have purchased and developed their properties relying on existing zoning ordinances.

Revised Code of Ohio § 713.13 provides:

> No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

It will be noted that this statute grants to contiguous or neighboring property owners the right to institute a suit for injunction to prevent not only a violation but also a threatened violation.

The present suit in the District Court was not only a threatened violation but also it has actually resulted in a nullification of the zoning ordinance on which the property owners relied in the purchase and development of their properties.

Even prior to the enactment of Revised Code of Ohio § 713.13 the Ohio courts had upheld the right of a property owner to bring a suit to enjoin the erection of a structure in violation of a zoning ordinance.

In *Pritz* v. *Messer,* 112 Ohio St. 628 (1925), the Supreme Court of Ohio, in an opinion written by Judge Florence Allen, who later was appointed to our Court, held:

> A property owner, residing in a municipality in which a valid zoning ordinance is in full force and effect, has legal capacity to apply for an injunction against the erection of an apartment building upon a lot contiguous to her real property, upon the ground that the proposed structure will violate the zoning ordinance. (Syl. 3)

In *Rosenberg* v. *Mehl,* 37 Ohio App. 95 (1930), the Court held:

> In landowner's suit to have zoning ordinance declared unconstitutional, court abused its discretion in overruling contiguous property owner's motion to be made party defendant. . . . (Syl. 2)

The Court said at page 99:

> If the court of common pleas should grant the relief asked for, it would certainly deprive the plaintiff in error Rosenberg of his rights declared under the decision in the case of *Pritz* v. *Messer.* He would be

> barred from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city, as this would mean an injunction against the carrying out of a judgment of a court of record, which judgment would be determinative of facts giving rise to plaintiff in error's cause of action. (*Id.* at 99-100)

Revised Code of Ohio § 713.13, enacted subsequent to *Pritz* and *Rosenberg,* extended the coverage from contiguous to neighboring property owners.

So, in the present case, like *Rosenberg,* the denial of the motion to intervene has barred the property owners "from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city. . . ."

It is interesting to note that the Court of Appeals for the District of Columbia, in *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C. Cir.) *cert. denied,* 323 U.S. 777 (1944), cited *Rosenberg* as authority, in footnote 4. The Court held:

> Rule 24(a) of the Federal Rules of Civil Procedure 28 U.S.C.A. following section 723c, provides for intervention of right "upon timely application • • • when the representation of the applicant's interest by existing parties is or may be inadequate *and the applicant is or may be bound by a judgment in the action;*" [italics supplied]. It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the event of taking away their statutory right to an independent action based on the order. Otherwise, adjoining property owners could relitigate the issues in the case any time the plaintiff began construction, on the theory that their right to bring an independent action was not concluded by the decree. (*Id.* at 507)

As previously stated in *Wolpe,* the intervention was allowed after judgment so that the intervenor could appeal from a judgment from which the Zoning Commission should have appealed.

In our opinion the decisions of the Ohio courts in *Pritz* and *Rosenberg* and of the Court of Appeals for the District of Columbia in *Wolpe,* can further be justified on the ground that intervention was necessary to accord the property owners due process of law guaranteed by the Fifth Amendment.

In *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), Mr. Justice Stewart, who wrote the opinion for the Court, stated:

> A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

It is next contended that the property owners would be adequately represented by the Law Director and his assistants who were representing the City of Toledo, the Mayor, the City Council, and the Plan Commission. We disagree.

The municipal defendants were charged with maintaining a segregated city, and with racial bigotry, bias, hypocrisy, and with discrimination against Negroes.

There was no proof that race had anything to do with the adoption of the existing comprehensive zoning ordinance in effect at the present time. The plaintiffs were claiming that because of the conduct of the officials they were entitled to have the area rezoned.

The property owners, on the other hand, were interested solely in protecting the values of their own property which they did not want to be diminished by a change in the zoning.

The municipal defendants had enough to do to defend themselves against the charges leveled against them by the plaintiffs. They do not have the same interest in protecting the values of the homeowners' properties as do the homeowners themselves.

The defendants, City of Toledo, *et al.,* filed in the District Court a memorandum in support of the motion to intervene. They gave as the reason:

> . . . [T]he interests of the Intervenor-Defendants may well be different if not inconsistent with the interests of the Defendants, City of Toledo, et al, and therefore their interests may not be adequately represented by the present defendants.

This was plain notice to the District Judge that the attorneys for the City of Toledo, *et al.,* did not want to represent the property owners; that the interests of their clients may well be different, if not inconsistent, with the interests of the property owners; and that, therefore, their interests may not be adequately represented.

It is not understandable that the District Judge under these circumstances would deny the motion to intervene when he was advised of a conflict of interest, which would have made it unethical for the City Attorneys to represent the property owners without their consent. Canons of Professional Ethics of American Bar Ass'n, No. 6.

The City's Attorneys already had their hands full in representing the Plan Commission. The staff of the Plan Commission was co-operating with Skillken, *et al.,* and did not at first disclose to the Plan Commission the fact that the Skillken proposal was a TMHA Housing Project.

Under these circumstances we do not indulge in the presumption, suggested by plaintiffs, that the City, *et al.,* would adequately represent the property owners.

Reliance on our decision in *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F.2d 955 (6th Cir. 1970), is

misplaced. In *Woodland* property was condemned for urban renewal and a company owning a leasehold interest in the neighborhood claimed to be damaged because its customers had been removed. Its leasehold interest in the land remained intact.

In the present case the City of Toledo would not have any right to change the existing zoning ordinance after property owners had purchased their property relying on it, without first resorting to appropriate procedures. As we will point out later, neither did the District Judge, in attempting to exercise legislative functions, have any such right.

II.

The City of Toledo is a municipal corporation with Home Rule Powers of self-government conferred on it by Article XVII § 3 of the Constitution of Ohio. These powers are defined in its Charter which grants full power to the City to pass such ordinances as are expedient for maintaining and promoting the peace, good government and welfare of the City.

The zoning ordinance is codified in Chapter 9 of the Toledo Municipal Code, and it divides the City "into districts in accordance with a comprehensive plan for the purpose of limiting and regulating the height, bulk and location of buildings, set back building lines, area and dimensions of yards and other open spaces, and the use of buildings and other structures and of premises in such zones or districts, . . . all of which is done in the interest of the public health, safety, convenience or general welfare."

The Toledo ordinance requires notice to be given to the owners of adjoining, adjacent and neighboring land of any hearings on rezoning.

The hearings on the preliminary platting were conducted before the Plan Commission, and hearings on the rezoning

were conducted before the City Council. Property owners from the areas of all of the three projects attended en masse and vigorously protested. They were all permitted to be heard. Skillken's attorney also attended and presented his views in favor of the platting and the rezoning.

No representative of TMHA appeared at any of the hearings before the Plan Commission or the City Council to support the rezoning and the platting.

The property owners voiced their objection to all three projects on the ground that the projects would seriously depreciate the value of their homes. Objection to the Stateline Road project was made also on the grounds of poor soil conditions and flooding.

The Plan Commission disapproved of the preliminary platting of the two projects. The City Council, by Resolution 1-74, rejected the rezoning of the Heatherdowns project.

The reasoning for the disapproval of the preliminary platting by the Plan Commission and for the rejection of the rezoning of the Heatherdowns site by the City Council is set forth at length in the transcripts of hearings before those bodies and in the testimony by way of deposition of Stratman Cooke, a member of the Commission and now its Chairman. Chairman Cooke is a Negro. The action of the Commission was by a unanimous vote.

These reasons were substantially as follows:

1— The TMHA projects in recent years had been a dismal failure. Projects had been started and were not completed. Projects which had been completed were unoccupied. Evidence of these facts was proffered when the Court rejected it as irrelevant.

2— The clustering of forty to fifty units of low-income housing was not the proper approach for the entire city as it created an isolated neighborhood within a neighbor-

hood. The Commission suggested that developers be required to include some low-income homes in each new development. They also suggested an extension of TMHA's leased housing project and the building of public housing on scattered individual sites to distribute low-income housing throughout Toledo.

3— TMHA has neglected to meet with residents in the area of the proposed projects to explain their virtues annd to endeavor to overcome any resistance.

4— The proposed projects would not produce orderly development of the land to obtain harmonious and stable neighborhoods, and were not in the best interests of the public.

5— There was doubt about the adequacy of the Stateline site based on reports of neighbors as to past flooding and landfill problems.

All of these matters were required to be considered by the members of the Plan Commission and the City Council in the performance of their duty. None of them has any racial overtones.

It is also significant that neither Skillken or TMHA endeavored to meet with either the Plan Commission or the City Council after the rejection to work out a better and more acceptable plan for public housing.

We note that the District Judge passed upon evidence considered by the Plan Commission and the City Council, but he reached a different conclusion. The trouble is that he was not a member of either body, and further, he had no appellate jurisdiction to review their decisions.

The District Judge held that Resolution 1-74 enacted by City Council, denying rezoning of the Heatherdowns tract, was illegal and void. For the reasons stated in in this opinion we disagree.

But assuming that Resolution 1-74, denying rezoning, was invalid, it would follow that the valid existing zoning ordinance requiring 20,000-square foot lots with 100-foot frontage, would remain in full force and effect. This result, however, did not bother the District Judge. He simply ordered the City Council to pass another ordinance to rezone the tract to 9,000-square foot fots. The figure of 9,000 square feet was used rather than the figure of 6,000, contained in the written petition for rezoning, because counsel for Skillken had indicated that the higher figure was acceptable.

It is clear that in ordering the members of the City Council to pass a new zoning ordinance, the District Judge was exercising legislative powers which he did not possess.

We commented on this in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087, 1092 (6th Cir. 1974), *cert. denied.* 43 U.S.L.W. 3088 Jan. 14, 1975, as follows:

> In oral argument one of counsel for appellees even went so far as to suggest that the single Judge could order individual councilmen to vote for a cooperation agreement. While this course of action might have been a way to order relief without exceeding jurisdictional bounds, we think such action would have been highly improper. Quite simply, it would have been a violation of the separation of powers with the court acting as a legislature.

The Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479 at 482 (1965), used much stronger language than we did in *Mahaley, supra*, Mr. Justice Douglas, speaking for the Court, said:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

With equal propriety the members of Congress could be sued individually and charged with racism, hypocrisy, and bigotry and ordered by a Court to enact new legislation increasing economic and social programs for minorities.

Federal Courts do have jurisdiction and power to pass upon the constitutionality of Acts of Congress, but we are not aware of any decision extending this power in Federal Courts to order Congress to enact legislation. To do so would constitute encroachment upon the functions of a legislative body and would violate the time-honored principle of separation of powers of the three great departments of our Government. This principle is equally applicable to the power of a Federal Judge to order a state legislative body to enact legislation. The enactment of legislation is not a ministerial function subject to control by mandamus, prohibition or the injunctive powers of a court.

III.

Toledo's population in 1970 was 329,068, of whom 86% were white, 14% were black, and 1% other minority groups. 28% of the population, or 35,000 households, were eligible for public housing; 21% of those eligible were black, and 79% were white. Thus there are more than three times as many whites who need public housing than there are blacks needing housing.

The District Judge found that Toledo was a racially segregated city, with public officials who were bigots. He determined that the action of the Plan Commission and of the City Council was racially motivated. He also paid his respects to TMHA, stating:

> This example of bureaucratic ducking is typical of TMHA's pusillanimous approach to its responsibilities.

The fact is that black families are living in virtually all parts of Toledo. This was testified to on cross-examination

of plaintiff's witness, Emerson Cole, a black member of Ohio Civil Rights Commission, who had lived in Toledo for forty-three years, and who testified as follows:

> Q. It is a fact, is it not, that there are black people living in virtually every area of the city of Toledo?
> A. Yes. (88a)

Mr. Cole further testified that Toledo had set up a Board of Community Relations, dedicated to resolve problems of housing discrimination, which Board works with him. (88a).

This can hardly be the work of bigoted public officials.

The fact that some black people, but not all, are concentrated in a certain area of the city, is no proof of official discrimination, and the District Judge was in error in inferring it.

Nor can the municipal defendants be held responsible for private discrimination or for discrimination by other bodies, or for the location of public housing. The present cooperation agreement did not give the defendants any voice in the selection of sites for housing.

Negro families have not been excluded from the Ragan Woods subdivision, nor have other minorities who have the money to purchase property there. In Ragan Woods there are also first and second generation Americans of Greek, Italian, Polish, Hungarian, Czechoslovakian, Irish, English, Swedish, and Scottish descent.

The District Court erred in applying the compelling interest test, rather than a rational basis test, in determining whether Toledo's legislation was invalid. The ruling conflicted with our decision in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority, supra.*[4]

---

[4] Even applying the compelling interest test, it is clear that Toledo had a valid public interest to protect its zoning laws from wholesale nullification, a result which would disrupt the entire

Lindsey v. *Normet,* 405 U.S. 56 (1972), holds that no one has a constitutional right to adequate public housing. We rely also on *Citizens Comm. for Faraday Wood* v. *Lindsay,* 362 F.Supp. 651 (S.D.N.Y. 1973), which has since been affirmed by the Second Circuit Court of Appeals, 507 F.2d 1065 (2d Cir. 1974).

In *Faraday Wood* Judge Lumbard stated:

> However, even if we adopted the standards of these cases the plaintiffs have failed to show that the city acted in bad faith. AMIH knew that this proposal had to be approved by the New York City Board of Estimate before the parties could enter into a binding contract. The Board of Estimate is a political body so AMIH knew that it would consider expression of opinion by members of the public. It seems to us that it is a proper exercise of discretion for HDA to terminate a project when it feels that the Board of Estimate is unlikely to approve it because of public protest and political considerations. (507 F.2d at 1072)

In *Palmer* v. *Thompson,* 403 U.S. 217 (1971), the Court held that a neutral policy which had a greater impact on a minority group was not invalid.

The zoning laws in the present case are not inherently suspect. To apply the compelling interest test would virtually invalidate all forms of state legislation where people are affected differently.

The compelling interest rule was rejected in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *James* v.

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community and would inflict heavy losses on many innocent people. Such zoning laws, enacted under the police power, "are essential to orderly community development." *Forest City Enterprises, Inc.* v. *Eastlake,* 41 Ohio St.2d 187, 189, *cert. granted* Oct. 14, 1975, 44 U.S.L.W. 3222.

Valtierra, 402 U.S. 137, 142 (1971); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Citizens Comm. for Faraday Wood* v. *Lindsay, supra; Ranjel* v. *City of Lansing,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1969), *rehearing denied,* 397 U.S. 1059 (1970).

It is significant that no attack has been made here on Toledo's comprehensive zoning ordinance. It was neutral legislation enacted long before the controversy in the present case arose.

The constitutionality of Ohio's zoning laws was first upheld by the Supreme Court in *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926). *Euclid* was followed in *Berman* v. *Parker,* 348 U.S. 26 (1965), and most recently in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). In *Belle Terre* Mr. Justice Douglas, who wrote the opinion for the Court, stated:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Eual Protection Clause if the law be "'reasonable not arbitrary'" (quoting *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed,* 401 US. 71, 76. (p. 8)

In *James* v. *Valtierra,* 402 U.S. 137 (1971), the Supreme Court upheld California's requirement of referendum approval by the voters of low cost housing. *Cf. Ranjel* v. *City of Lansing,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980, *rehearing denied,* 397 U.S. 1059 (1970), for referendum on rezoning.

The entire complaint here is that the legislative body of Toledo refused to rezone.

In Ohio zoning is a legislative function. *Forest City Enterprises, Inc.* v. *Eastlike,* 41 Ohio St.2d 187 (1975), *cert. granted* Oct. 14, 1975, 44 U.S.L.W. 3222.

In our opinion there was a rational basis for the enactment of Toledo's zoning ordinance and also for the actions of the Plan Commission in denying platting and of the City Council in rejecting rezoning of the Heatherdowns project.

Recently the Supreme Court held that plaintiffs bringing suits to compel housing in municipalities must have standing to sue. *Warth* v. *Seldin,* —— U.S. —— (No. 73-2024, decided June 25, 1975, 43 U.S.L.W. 4906).

Under date of October 14, 1975 the Supreme Court granted certiorari in the case of *Forest City Enterprises, Inc.* v. *Eastlake, supra,* which invalidated, for violation of the Fourteenth Amendment, a charter provision of a municipality requiring land use changes to be ratified by the voters in a city-wide election.

Although the complaint in this case related only to the action of the Plan Commission and the City Council in respect to three sites which Sillken desired to develop, the broad order entered by the District Judge subsequent to his published opinion converted the nature of the case to that of an action to desegregate the residential area of the entire city of Toledo, and, like the procedure in a school desegregation case, the municipal defendants were ordered to submit to the Court within ninety days a comprehensive plan for desegregation of housing.

Under this broad order all zoning laws in conflict therewith would be invalidated. Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against any-

one, would be faced with a total change in their neighborhoods, with the values of their properties slashed. All of this would be accomplished simply by an order of a Federal Judge, and at the expense of the taxpayers.

It is submitted that Congress never vested any such power in Federal Judges.

Members of the City Council did not cause nor create the concentration of black people in Toledo, and they are under no legal obligation to deconcentrate the area or to change the zoning laws to bring about deconcentration.

Nor are the city officials responsible for private discrimination, most of which, we believe, occurred prior to Ohio's Civil Rights Act, Ohio Rev. Code §4112.01 *et seq.,* and the decision of the Supreme Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), which afford adequate remedies for private racial discrimination in housing.

It was argued that housing units were constructed in Toledo in the areas of racial concentration. It should be remembered that ever since the 1968 co-operation agreement the location of housing units was the sole province of TMHA.

Nor do we regard the refusal of the City Council to rezone and the Plan Commission to replat, as obstructing the rights of minorities to housing, upon which an inference of discrimination "in effect" may be drawn against those bodies.

Nor can the city officials be blamed for the substandard public housing already constructed by TMHA, or for TMHA's permitting projects to remain vacant or in a state of disrepair, as was described in proof which was excluded by the District Court but was duly proffered.

We live in a free society. The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to

permit the construction at public expense of large numbers of low cost public housing units in a neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families.

A federal court ought not to exercise state legislative functions. It is without power to do so, and furthermore it has not developed proficiency in that field.

There is not an iota of evidence that any of the property owners ever discriminated against black people, or were in any way responsible for their concentration in certain areas of Toledo. These property owners have constitutional rights just as dear to them as they are to the minorities. Their constitutional rights included the right to own property and not to have its value destroyed without due process of law.

It is submitted that it should not be necessary to violate the constitutional rights of the majority of the population of a city in order to grant relief to a minority group.

Relative to the platting of Holland-Sylvania and Stateline sites, the District Court, in our opinion, did not give adequate consideration to the nonracial reasons stated by the Plan Commission and the City Council in denying the platting, and did not consider the rights of these areas' property owners who opposed the platting. These rights must be determined upon the remand.

The order of the District Court further finds that the City violated the cooperation agreement but does not state in what respect.

The plaintiffs in their brief (p. 23) state that the cooperation agreement—

> . . . requires the city to cooperate with TMHA in the development of these units, including the making of reasonable and necessary changes in zoning for the development of TMHA projects.

Plaintiffs neglected to state that such cooperation was limited by the first sentence in the paragraph, which expressly states:

> Insofar as the Municipality may lawfully do so . . .

It would not be lawful for Toledo to contract away or to restrict its legislative powers, nor to delegate them to TMHA. *Forest City Enterprises, Inc.* v. *Eastlake, supra;* 10 Ohio Jur.2d, *Constitutional Law,* §§ 239, 315. In *Forest City* the Court stated:

> In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. (41 Ohio St. 2d at 189)

In that case also, the Court cited *Berg* v. *Struthers,* 176 Ohio St. 146 (1964); *Tuber* v. *Perkins,* 6 Ohio St.2d 155 (1966); *Donnelly* v. *Fairview Park,* 13 Ohio St.2d 1 (1968).

Skillken obviously recognized this fact when he applied to the City Council for rezoning and to the Plan Commission for platting. It would not have been necessary for Skillken to do this if the cooperation agreement validly waived the zoning laws.

The fact is that over the years from 1938 the City did furnish police and fire protection and other services required by the cooperation agreement. It would appear that the only violation claimed by the plaintiffs was that the city did not change its zoning laws and approve preliminary platting, in the present case. It was not required to make such changes unless lawfully approved by the governing body of the city.

The judgment of the District Court is reversed and the cause is remanded for dismissal of the complaint with respect to the rezoning and platting of Heatherdowns.

With respect to the platting of Holland-Sylvania and Stateline sites the cause is remanded for further consid-

eration by the District Court after the parties have endeavored to work out an amicable solution of their problems which include scattered housing sites and housing in new developments, and consideration of the rights of the property owners in the two areas.

Each party will pay his own costs in this appeal.

PHILLIPS, *Chief Judge.* (Concurring in the result.) I concur in the results reached in the opinion prepared by Judge Weick.

My opinion is that the record contains no support for the District Court's statement that the actions of the City Council and the Plan Commission were a "sad display of bigotry, intolerance, and selfishness at its worst." 380 F.Supp. at 231. Not only is this finding clearly erroneous, but it is also likely to be counterproductive in the sensitive and controversial circumstances of this case.

I also agree that the record of this case does not provide a basis for the action of the District Court in ordering that the City of Toledo submit a comprehensive plan for the elimination of all discriminatory barriers in housing.

As this court said in *Garrett* v. *City of Hamtramck,* 503 F.2d 1236, 1249 (6th Cir. 1974), affirmative provisions in a decree "should be no greater than required because courts are ill-equipped to administer the details of a municipality's affairs." In my opinion the requirement that Toledo develop a sweeping plan of affirmative action is unnecessary in this case. More important, it would deeply involve the District Court in complex and delicate problems of city planning that are best left to the municipal government and to the various administrative agencies.

Appeal No. 74-2116 is from the decision of the District Court denying the petition of Ragan Woods Homeowners Association, et al., to intervene as parties defendant. I agree that these parties had a right to intervene under Fed. R. Civ. P. 24(a) and the the District Court committed reversible error in denying leave to intervene under the facts and circumstances of this case.

I interpret the opinion prepared by Judge Weick to make final disposition of only one issue the rezoning of the Heatherdowns tract. I agree that the decision of the District Court should be reversed on this issue and that the complaint should be dismissed insofar as it seeks the zoning and platting of Heatherdowns.

I further agree that the issues of platting the Holland-Sylvania and Stateline sites should be remanded for further consideration after the parties have endeavored to work out an amicable solution to their problems. All the parties to this appeal are, or should be, interested in the development of the City of Toledo, where all citizens, black and white, will have equal opportunities for adequate housing, without discrimination. The parties are, or should be, interested in avoiding a situation for Toledo such as is described in *United States* v. *City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). These are problems that should be resolved effectively by persons of good will, working at the level of local government, and not by mandates of federal courts.

If parties are not successful in working out an amicable settlement of their differences, the District Court will have another opportunity to pass upon the issues in the light of all evidence then on file, including the evidence heard on remand.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for the crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 1 of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. 1983

Exery person who, under color of any statute, ordinance, reuglation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant provision of 42 U.S.C. 2000d is as follows:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The relevant provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*, are as follows:

Section 3604

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful——
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

Section 3612(a)

> The rights granted by sections 803, 804, 805 and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount of controversy and in appropriate State or local courts of general jurisdiction.

Section 3612(c)

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Section 3617

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encour-

aged any other person in the exercise or enjoyment of, any right granted or protected by section 802, 804, 805, or 806. This section may be enforced by appropriate civil action.

Supreme Court, U. S.
FILED
FEB 18 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-1002

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1
STATEMENT OF FACTS 3
ARGUMENT 4
CONCLUSION 15
APPENDIX:
Excerpt From Transcript of Proceedings 17

TABLE OF AUTHORITIES

Cases

Crow v. Brown, 457 F.2d 788 (5th Cir. 1972) (per curiam) 5, 7, 8, 9
Garrett v. City of Hamtramck, 503 F.2d 1236 (1974) 12, 14
Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (1970), *cert. denied*, 407 U.S. 1010 (1971) 5, 11, 12, 14
Joseph Skilken and Company, et al. v. City of Toledo, et al., Case No. C74-202 2
Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al., Case No. 74-2116 ..... 1, 2
Joseph Skilken & Co., et al. v. City of Toledo, et al., Case No. 74-2320 ..... 1, 2
Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409, *cert. granted*, 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975) 4, 6, 9

United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) 5, 8, 14

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) 5, 9, 10, 11

Constitution and Statutes

Constitution of the United States:

Thirteenth Amendment 3
Fourteenth Amendment 3

Ohio Revised Code, Sections 3735.27, et seq. 4
28 U.S.C. 1331 3
28 U.S.C. 1343 3
42 U.S.C. 1401, et seq. 3
42 U.S.C. 1981, 1982, 1983, 2000(d), 3601, et seq. 3
42 U.S.C. 3612 3
42 U.S.C. 3617 3

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The petitioners herein apparently seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in both Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, and in Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*

Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*, was commenced by the filing of a Complaint in the United States District Court for the Northern District of Ohio, Western Division, on May 28,

1974, entitled *Joseph Skilken and Company, et al. v. City of Toledo, et al.*, Case No. C74-202. Following a pretrial conference on June 5, 1974, various stipulations between the parties, and the Order of the Court of June 18, 1974, the defendants filed their Answer on June 25, 1974. The trial was placed on an accelerated schedule and, over the objection of the defendants, the trial commenced on July 15, 1974, and ended on July 19, 1974. The trial was bifurcated by the District Court, with the issues of injunctive and declaratory relief being heard by the Court and the issue of damages reserved for a later trial by jury.

Within three days after the answer to the Complaint was filed, a motion to intervene was filed by the Ragan Woods Homeowners Association and four individual property owners. Other motions to intervene were filed. The Ragan Woods Homeowners Association and others who attempted to intervene perfected an appeal to the Sixth Circuit Court of Appeals, which is Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, which was consolidated with Case No. 74-2320 for oral argument. Both cases were disposed of by the Opinion of the Sixth Circuit Court filed December 10, 1975.

Following the accelerated trial, the District Court took the case under consideration and on August 28, 1974 issued its Memorandum Opinion (Pet. App. 1A). On October 8, 1974, the Court issued its final Order regarding the declaratory and injunctive relief to be granted to the plaintiffs (Pet. App. 20A).

On October 18, 1974, the defendants, the City of Toledo, et al., filed their Notice of Appeal with the District Court,

and on that same date the plaintiffs filed a Motion to expedite the certification of the record to this Court. On October 21, 1974, the District Court ordered that the certified record on appeal be transmitted to this Court by October 25, 1974.

On December 11, 1974, the Clerk of the Circuit Court docketed the defendants' Appeal and the briefing schedule was accelerated so as to require the defendants-appellants' Brief to be filed with the Court on or before January 6, 1975. The plaintiffs filed no cross appeals in the instant matter.

The cases were argued to the Sixth Circuit Court of Appeals on February 3, 1975. On December 10, 1975, the Sixth Circuit Court of Appeals announced and filed its decision and Opinion (Pet. App. 25A).

STATEMENT OF FACTS

The original Complaint filed by the plaintiffs herein claimed jurisdiction under Sections 42 U.S.C. 1401, et seq.; 42 U.S.C. 1981, 1982, 1983, 2000(d), 3601, et seq. and the Thirteenth and Fourteenth Amendments to the United States Constitution. The District Court found jurisdiction pursuant to 28 U.S.C. 1331 and 1343 and 42 U.S.C. 3612 and 3617.

The plaintiffs are Joseph Skilken and Company (hereinafter Skilken), a corporation engaged in the development and construction of residential dwelling units; the Toledo Metropolitan Housing Authority (hereinafter TMHA); Sandra Hueston and Jose Maldonado, who claim to represent a class of persons defined by the District Court as: "All low income minority persons residing in the Toledo Metropolitan Area, who, by virtue of their race and pov-

erty, are unable to secure decent, safe, and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (TMHA) and who are eligible for the Turnkey III Housing Program."

The defendants in the case are as follows: The City of Toledo (hereinafter City), a body corporate and politic established and organized under the laws of the State of Ohio; Harry Kessler, the elected Mayor of the City of Toledo and a member of the Toledo City Council; Defendants Cook, Copeland, Daoust, Douglas, Galvin, Nies, Pietrykowksi and Reddish are the duly elected Council members of the City of Toledo; the defendant, City Plan Commission (hereinafter Commission), a commission established and organized under the statutes of the State of Ohio, Ohio Revised Code Sections 3735.27 et seq., and the ordinances of the City of Toledo; Defendants Burke, Cooke, Martin, Schimmel and Stoepler are members of the Commission appointed pursuant to the statutes of the State of Ohio and the ordinances of the City of Toledo. Unless specifically indicated, the defendants will hereinafter be collectively referred to as the "defendants."

ARGUMENT

The petitioners cite as reasons for granting the Writ that there is a conflict among the Circuits and that the decision of the Sixth Circuit Court of Appeals in these cases is inconsistent with the prior decisions of this Court. The primary conflict which petitioners apparently see is with the decision of the Seventh Circuit Court of Appeals in the case of *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409, *cert. granted*, 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975). They also cite as being

in conflict with the decision of the Sixth Circuit the following, to-wit: *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (1970), *cert. denied*, 407 U.S. 1010 (1971); *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972) (per curiam); and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974). These cases are factually unlike the instant case.

The City of Toledo is not a racially segregated city and the action by the Council of the City of Toledo and the City Plan Commission did not have a disproportionate racial impact. The population of the City of Toledo in 1970 was 329,068, of whom 85% were white, 14% were black, and 1% of other minority groups. 28% of the population of the City of Toledo, or 35,000 households were eligible for the kind of public housing under consideration in this case. 21% of the eligible for such public housing were black or other minorities, and 79% were white. Thus, there are more than three times as many whites who are eligible for public housing as minorities (Appendix 17).*

The petitioners have attempted to create an impression that the City of Toledo is racially segregated by characterizing an area of the City as the "Black Corridor" or the "Southwest Corridor." While that may be a catchy phrase, it is unsupported by the facts. There are black people living in every area of the City of Toledo. This fact was testified to by plaintiffs' witness. Thus, Emerson Cole,

*Actually, the percentage of minority people eligible for public housing is less than 21%. Plaintiffs' experts who testified to those figures used an income eligibility figure which was too low and testified that if they had used a higher figure more whites would be eligible and consequently a smaller percentage of minorities.

a black member of the Ohio Civil Rights Commission, who had lived in Toledo for 43 years, testified as follows:

> "Q. It is a fact, is it not, that there are black people living in virtually every area of the City of Toledo?
>
> "A. Yes." (Appendix 17.)

Testimony by a number of black witnesses, including plaintiffs' own witnesses, indicated that they lived in the "Southwest Corridor" (See testimony of Emerson Cole (Appendix 17); Wayman D. Palmer (Appendix 18); Stratman Cooke (Appendix 18); and E. L. Leverette (Appendix 19)). *All of these witnesses who were questioned on the subject indicated that their place of residence was a matter of their own free choice and not due to any lack of available housing for blacks in other areas* (Appendix 17, 18).

Uncontroverted testimony by Wayman D. Palmer, the Director of the Department of Community Development for the City of Toledo, clearly established that the City, in cooperation with the Federal government, has poured millions of dollars into programs designed to eradicate discrimination and thereby aid minority citizens of the City of Toledo, including millions of dollars for housing relocation (Appendix 19-24).

This is entirely unlike the factual situation that we find in each of the cases cited by the petitioners as being in conflict with the instant case. In the case of *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409 (1975), the Seventh Circuit Court noted:

> "According to statistics of plaintiffs' expert, demographer and urbanologist Pierre de Vise, Arlington Heights is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents." (Footnote 1, p. 414)
>
> ". . . More specifically, the population of Arlington Heights in 1970 was 64,884, but only twenty-seven residents were black. The four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black. Indeed, the percentage of blacks in this area actually decreased over this ten-year span while the percentage of the population in the entire Chicago metropolitan area that was black increased from fourteen percent to eighteen percent." (p. 414)

Perhaps more significant, it appears that Arlington Heights was actually exploiting the problem. The Court said:

> "Indeed, it has been exploiting the problem by allowing itself to become an almost one hundred percent white community."

It is clear that the Seventh Circuit limited its Opinion to the factual situation that existed in Arlington Heights. The Court said:

> "We therefore *hold that under the facts of this case* Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects." (emphasis added) (p. 415)

Such a factual situation is totally unlike the City of Toledo.

In the case of *Crow v. Brown*, 457 F.2d 788 (1972), it appears that the county officials who were acting in that

case did so for the avowed purpose of excluding blacks from certain areas of the county. Thus, the Fifth Circuit Court of Appeals said:

> "The district court accurately and succinctly stated the issue in these consolidated cases:
>
> > "The broad issue raised by these plaintiffs here . . . is whether the Fourteenth Amendment to the United States Constitution prohibits the County defendants from exercising whatever discretion allowed by municipal law *for the avowed purpose of excluding low-income blacks* from apartments proposed for construction on land zoned for apartments." (emphasis added)

Certainly there is no such avowed purpose to discriminate in the instant case. In addition, in the *Crow* case, *supra*, a pattern of residential racial discrimination was clear. Thus, the District Court found:

> "Within the immediate future, unless drastic changes occur, it is *not merely possible but certain* that Atlanta will become, in essence, a black city with a solid white perimeter." (Quoted by the Fifth Circuit Court of Appeals at 789) (emphasis added)

Such a factual situation is totally unlike the City of Toledo.

In the case of *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (1974), we see a case of clearly discriminatory conduct. The Fifth Circuit Court of Appeals said:

> "In the light of this duty, we believe that the district court's threshold determination of 'no satisfactory evidence of discrimination' is clearly erroneous. For the evidence presented below clearly demonstrates

> that the effect of the City's action was racially discriminatory: minority citizens' requests were refused while white citizens' requests were granted. It was undisputed below that the City has made exceptions to its annexation requirement for whites. The City would not do so for these minority farmworkers. It is also undisputed that the City has changed its Master Land Use Plan designations for whites. Again, the City would not do so for these farmworkers. From this alone, it is clear to us, and it should have been clear to the city officials, that the effect of their refusal was racially discriminatory. To prove a prima facie case of racial discrimination, no more is required."

Such a situation does not exist in the City of Toledo.

In the case of *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (1974), we have a situation very much like Arlington Heights (*Metropolitan Housing Development Corp. v. Village of Arlington Heights, supra*), and the unincorporated area around the City of Atlanta, Georgia (*Crow v. Brown*, 457 F.2d 788). That is, the Village of Black Jack was virtually all white. The Eighth Circuit Court of Appeals said:

> "The racial composition of Black Jack and the surrounding area was set forth by the District Court in its opinion, and is not contested by the parties:
>
> > "Statistical information submitted shows that at the relevant time the area which is now the City of Black Jack was virtually all white, with a black population of between 1% and 2%. The area of St. Louis County north of Interstate Highway 270, which includes Black Jack, is approximately 99% white. • • •

"The virtually all-white character of Black Jack was in marked contrast to the racial composition of other parts of the St. Louis area. In 1970, the pupil population of the City of St. Louis School District was 65.6% black. * * * In 1970, the Kinloch School District, which is only two miles from the nearest boundary of the Hazelwood School District (of which Black Jack is a part), had 1,245 students, all of whom were black.

"The percentage of blacks in St. Louis County has increased only slightly overall from 4.1% in 1950 to 4.8% in 1970. During the same period, the percentage of blacks in the City of St. Louis more than doubled from 17.9% to 40.9%.

"Between 1950 and 1970, the population of the city declined * * * (by) 27%, while the population of the county more than doubled * * *. From 1960 to 1970, there were approximately 102,298 new housing starts in the county, and 15,348 in the city, a ratio of almost 7 to 1. During the same period, the city had a net decrease of 24,548 housing units, while the county had a net increase of 84,169. * * *

"The concentration of blacks in the city and in pockets in the county is accompanied by the confinement of a disproportionate number of them in overcrowded or substandard accommodations. The 1970 census reveals that in St. Louis city and county approximately 40% of the black families, as compared with 14% of the white families, lived in overcrowded units. * * *" *United States v. City of Black Jack, Missouri, supra,* 372 F. Supp. at 325.

In addition, in *City of Black Jack,* we also find deliberate racial discrimination by the federal, state and local

governments. In commenting on this aspect of the case, the Eighth Circuit Court of Appeals said:

> "The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was
>
> > * * * in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state and local governments. * * *" *United States v. City of Black Jack, Missouri, supra,* 372 F. Supp. at 326.

In the instant case, we find neither intentional discrimination by city officials nor an all-white city such as Black Jack.

We find the same pattern repeated in the case of *Kennedy Park Homes Association v. City of Lackawanna, New York,* 436 F.2d 108 (1970). In *Lackawanna,* we find all (98.9%) of the minority people living in a separate area of the city physically separated from the all-white area by a single bridge. The Second Circuit Court of Appeals found:

> "First, we have a three-ward city with 98.9 percent of all of its nonwhite citizens living in the First Ward. The Second Ward, with a population of 8,974, has only one nonwhite person, while only 29 nonwhites reside in the Third Ward. The Bethlehem Steel Company's plant, with its more than 20,000 employees, occupies at least half of the land area of the First Ward. This Ward also has the oldest, most dilapidated dwelling houses, and the highest residential density with the greatest percentage of persons per unit in the city. Health-wise it is classified as a 'high risk area,' having double the incidence of tuberculosis and the high-

est infant mortality rate of the entire city. Its juvenile crime rate is three times the city average, and its adult crime rate is double the average. The air pollution from the steel plant is at times unbearable because of the huge clouds of smoke, the dust and particles spewing from its furnaces and the open hearths that burn constantly. To add insult to injury, a series of parallel railroad tracks serves the steel mill, running along the east boundary of the First Ward and physically separating it from the rest of the City. Indeed the only traffic connection between the two is a single bridge that spans the railroad tracks at Ridge Road. This man made and City approved physical barrier actually segregates the black community of Lackawanna, located in the First Ward, from the rest of the City. The tracks are often tagged as the barrier 'between the "have" and the "have nots."'"

In addition, in the *Lackawanna* case, we find intentional racial segregation. The Second Circuit Court of Appeals, after reciting several acts by various city officials, concludes:

> "This panoply of events indicates state action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation."

We find neither of these elements present in the instant case nor existing in the City of Toledo.

To demonstrate that the Sixth Circuit Court of Appeals is not in conflict with other Circuits, one need only review the case of *Garrett v. City of Hamtramck*, 503 F.2d 1236 (1974). The District Court found and the Sixth Circuit Court of Appeals agreed that the City of Hamtramck had

been engaged in a program of "Negro removal." The Sixth Circuit Court of Appeals said:

> "We will proceed to consider the orders of the district court as they pertain to persons displaced by the Wyandotte Project and to be displaced by it and Denton-Miller and Grand Haven. A number of findings of fact are included in the court's order, and an examination of the record indicates that the underlying findings are supported by substantial evidence. The court could properly find that the Negro population of Hamtramck fell from 14.4 percent to 8.5 percent between 1960 and 1966 and that this resulted largely from implementation of the 'planned program of population loss' adopted as part of the master plan of the Vilican-Lehman Report. The record also supports the finding that the private housing market of Hamtramck was operated in a discriminatory fashion and that city officials were aware of this. There is also considerable evidence of racism and prejudice against Negroes on the part of various city officials. All Negroes living in the original Wyandotte Project area were displaced by the first urban renewal actions there, and it is clear that they received little or no relocation assistance. We also conclude that the record supports the court's finding in its order of March 30, 1973 that the City of Hamtramck has intentionally discriminated against Negro residents in violation of their constitutional and statutory rights."

While the Sixth Circuit remanded the case for further proceedings, it recognized the appropriateness of a broad remedy where an intentional discrimination existed. No such evidence of intentional violation is found in the instant case.

Clearly, the City of Toledo is factually unlike Arlington Heights, Black Jack, Delray Beach, the area surrounding Atlanta, Lackawanna, and Hamtramck. Blacks live in virtually every area of the City, to the extent that if there is any concentration of black people in any areas of the City, it is largely, if not exclusively, the result of the free choice of the people involved.

Neither is there the slightest evidence in the record to demonstrate or even to tend to prove that there was any racially motivated conduct by any defendants in this case or by any other City officials. This is in contrast with the situation found in *Lackawanna, Hamtramck* and *Delray Beach,* and to a significant but lesser extent existing in other cases cited by the petitioners.

Perhaps most significant, however, is the fact that the percentage of minorities eligible for public housing in the City of Toledo is not significantly larger than the percentage of minorities present in the entire City. Clearly, in any city there will be a slight deviation between the percentage of minorities in the city and the percentage eligible for public housing. When such a slight difference exists, it cannot be said that an action affecting public housing has a disproportionate impact on minorities. The Sixth Circuit Court of Appeals correctly determined that this was not a case of racial discrimination. For the Supreme Court of the United States to consider this case in connection with a factual situation such as we find in the Village of Arlington Heights, would not be helpful to the development and clarity of the law on this subject. Toledo is not Lackawanna, Hamtramck, or Arlington Heights, and in terms of racial balance is totally unlike them.

CONCLUSION

It is respectfully submitted that the decision of the Sixth Circuit in this case is not in conflict with the decisions of other Circuits and that the cases cited by Petitioners are factually unlike this case and that therefor this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

Testimony of Kenneth Suchan

Q. And I take it that if the TMHA figures, admission standards or policy, talk about adjusted income you would include a much larger group than 28 percent of the households, isn't that correct? A. The figure would increase from 28 percent, yes.

Q. Depending on how great the adjustment was? A. Yes.

Q. What percentage of the 28 percent of the people eligible for TMHA housing was black and what percentage white? A. Twenty-one percent of those eligible were black and 79 percent were white.

Q. You are talking about 21 percent of the 28 percent were eligible? A. That's right.

Q. Not 21 percent of the total population? A. No; 21 percent of the 35,000 households, roughly, who are eligible are black.

* * * * *

Testimony of Emerson Cole

* * * * *

Q. It is a fact, is it not, that there are black families and black people living in virtually every area of the city of Toledo? A. Yes.

* * * * *

Q. Where do you live? A. 1519 Oakwood.

Q. Where is that on the map? A. That's on the edge of the inner city.

Q. I take it that is the result of your personal preference to live in that area? A. It is.

* * * * *

Testimony of Wayne D. Palmer

Q. Where do you live, Mr. Palmer? A. 1104 McCullough Drive.

Q. And where is that? A. It's in the Secor Gardens area.

Q. Is that in what you would describe as the black corridor? A. It's slightly westward.

Q. Near what major street? A. Dorr Street and Secor Road.

Q. And how long ago did you move there? A. Fourteen years.

Q. At the time you moved there, what was the racial makeup of that neighborhood? A. About seventy percent white and thirty percent minority.

Q. Did you move there voluntarily? A. Yes, I did.

Q. Did you have any problem in moving there or taking that housing? A. No, I did not.

Q. And do you choose to remain there voluntarily? A. I choose to remain there, yes.

* * * * *

Testimony of Stratman Cooke

[By Stipulation]

* * * Cook will be received in evidence in lieu of his testimony with one additional stipulation that Mr. Cook is a man of the Negro race.

The Court: Pardon?

Mr. Jordan: That Mr. Cook is a Negro.

* * * * *

EXAMINATION

By Mr. Mulkeen:

Q. Would you state your name, please? A. My name is Stratman Cooke, S-t-r-a-t-m-a-n C-o-o-k-e.

Q. And would you please state your address? A. You want my business address?

Q. No, your residential, sir. A. 1074 Norwood Avenue.

Q. And is that in Toledo? A. Toledo, Ohio 43607.

* * * * *

Testimony of E. L. Leverette

* * * * *

Q. Would you please state your name? A. Emory L. Leverette.

Q. What is your address? A. 625 Moran Avenue, Toledo.

* * * * *

Testimony of Wayman D. Palmer

* * * * *

By Mr. Jordan:

Q. Mr. Palmer, I think you indicated that the City has spent since 1968 fifty million dollars in its neighborhood development program? A. Approximately.

Q. As I understand it, that money was designed to benefit three areas—four areas, I guess it is? A. Four areas.

Q. Three of those areas have a concentration of racial minorities in excess of ninety-eight percent; isn't that correct? A. Fairly close to that, yes.

Q. The fourth area has a racial concentration minority in excess of sixty percent? A. About that.

Q. How much of that fifty million dollars, actually speaking now of relocation in both the acquisition of real estate and in the providing funds for relocating, how much money since 1968 was actually provided to black and other minority people? A. I would say approximately forty percent of the total or approximately two million dollars.

Q. And with these funds these people were free to move to Chicago if they so chose to, Sylvania, Ohio, to Cleveland, wherever they wanted to go; isn't that right? A. May I ask what you mean by free?

Q. Well, they certainly had the choice to do that, to go to Chicago? A. They had their choice to move outside the City, yes.

Q. And nothing that your relocation officers could do could override the choice of these people to locate where they so desired; isn't that correct? A. That's correct.

Q. And I take it a great many minority who were provided these funds for relocating chose to live in areas of black concentration; isn't that right? A. It appears that the result has been that they remained within that area of concentration.

Q. And your people can't force them to go out and integrate any neighborhood because your people or because HUD or anybody else thinks that they ought to be forced to integrate the City, can they? A. No, we cannot force them to do that.

Q. Now, in addition to the neighborhood development program which provided fifty million dollars in the last six years, are there other programs that your agency has administered? A. The Model Cities Program.

Q. And how long has your agency administered the Model Cities Program? A. It's in its fifth year, winding up its fifth year.

Q. How much money has been spent in that program? A. Approximately twenty to twenty-two million dollars.

Q. And does that program have certain target areas? A. It has a specific target area, yes.

Q. It has a geographical area that it is designed to benefit exclusively; isn't that right? A. Yes.

Q. And what is that area? A. That area is approximately the same area that is encompassed by the neighborhood development program.

Q. And it would have the same concentration of racial minorities that we just spoke of? A. Yes, it would.

Q. What are some of the programs that this twenty-two million dollars was spent on? A. An assortment of health programs, educational programs, transportation programs, economic development, job training and placement, various other kinds of employment programs, some housing programs, legal assistance programs.

Q. In addition to the neighborhood development program and the Model Cities Program, are there other programs that your agency has administered? A. The activities of the Division of Inspection which administers the enforcement of State Board of Building standard codes.

Q. Are there other similar federally funded programs similar to the Model Cities Program? A. That our agency has administered?

Q. Correct. A. We currently are administering Manpower Training Programs under the Comprehensive Employment and Training Act.

Q. And how much money—how long have you been administering that program? A. Since January.

Q. January of 1974? A. Of 1974.

Q. And how much money is designed to be spent in that program? A. Approximately 3.9 million dollars.

Q. Is that designed to benefit the same general areas that you spoke of? A. No, it includes all of the City of Toledo, all of Lucas County and all of Wood County.

Q. And does it have certain private areas that you are to concentrate on? A. Not by definition, no.

Q. But in operation, does it? A. In operation, those census tracts within the cities and counties where the unemployment exceeds six percent.

Q. And does that tend, then, to give us at least one of the target areas being the same area that we just spoke of in the Neighborhood Development Program? A. The Neighborhood Development Program and Model Cities areas are included among those census tracts.

Q. Have you also certain programs of the Office of Economic Development? A. Not through the City of Toledo, through further employment.

Q. Who handles these funds? A. The Economic Opportunity Planning Association of Greater Toledo, Incorporated.

Q. What is that organization? A. It's a private nonprofit organization incorported under the laws of the State of Ohio for the—as the mechanism through which Toledo and Lucas County would receive and disperse funds under the Economic Opportunity Act of 1964.

Q. And it was basically formed by the City of Toledo and Lucas County as the local vehicle for the administration of these funds, is that correct? A. It was formed through collaboration between the City of Toledo and the County Commissioners.

Q. And these funds are also to be used in the entire Lucas County, isn't that right? A. They are target for the entire county, yes.

Q. But are there certain specific target areas that are designed to be benefited by those programs? A. There are general target areas.

Q. And do those target areas tend to be the same of the area of the Model Cities and the Neighborhood Development? A. Two of the target areas would be approximately those same.

Q. And how much money—This, as I understand it, was formed in 1964? A. Yes.

Q. And how much money has been spent by that agency in its years of existence? A. I would say close to a hundred million dollars.

Q. Now, with reference to the City's so-called workable program, it has several different aspects, doesn't it? A. Yes, it does.

Q. Could you generally tell us what those are? A. One is for code adoption and enforcement. A second is planning and programming. A third is housing and relocation. A fourth would be equal opportunity, and a fifth would be Citizen Involvement.

Q. And in which of those areas, in your opinion, has the city succeeded in implementing its workable program? A. I think there has been considerable progress made in the area of code adoption and enforcement; in planning and programming area, there has been a considerable progress made. Since the adoption of an Affirmative Action Program in June of '73 by the City of Toledo, there have been significant strides made in that area, particularly as it relates to employment.

Q. What was the fifth item you mentioned? A. Citizen Involvement or Citizen Participation.

Q. How has the City's performance been in that area? A. I would say generally good.

Q. So that what you're saying is that only in this one area of housing and relocation is it your opinion that the City has not performed as well as it should have? A. And in the Equal Opportunity section. It has not performed as well as I think it should have.

Q. Now, you've talked about relocation and said that the—or replacement, I guess, and said that the City should have replaced 3,000 houses and, in fact, only replaced 1,500, roughly half, 1,500. Are you acquainted with 235 and 236 housing? A. Yes, I am.

Q. And that is housing for the low and moderate income housing, isn't it? A. Yes, it is.

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Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 75-1002

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

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TABLE OF CONTENTS

Table of Authorities I

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument—

Federalism Is a Cardinal Principle of Our System of Government 3

Sixth Circuit Court of Appeals' Decision Was Eminently Correct 6

Petitioners' Reliance on *Village of Arlington Heights v. Metropolitan Housing Development Corporation* Is Misplaced 8

Political Decisions Invite Political Reaction 14

Conclusion 18

TABLE OF AUTHORITIES

Cases

Berman v. Parker, 348 U.S. 26 (1954) 4

Cornelius v. City of Parma, Ohio, 374 F. Supp. 730 (N.D. Ohio 1974), *cert. denied*, March 8, 1976 (No. 75-1012) 1

Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952) 3

Driscoll v. Austintown Associates (1975), 42 Ohio St. 2d 263 7

Duryea v. City of Rolling Meadows, 119 Ill. App. 2d 445 (1970) 10

Evans v. Abney, 396 U.S. 435 (1970) 4
Ferguson v. Skrupa, 372 U.S. 726 (1963) 3
Griswold v. State of Connecticut, 381 U.S. 479 (1965) 3
Hernandez v. Texas, 347 U.S. 475 (1954) 16
Holtzman v. Schlesinger, 414 U.S. 1304 (1973) 4
Karr v. Schmidt, 401 U.S. 1201 (1971) 3
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Metropolitan Housing Development Corporation v. Village of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974) 8, 9, 10
Metropolitan Housing Development Corporation v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975) 11, 18
The New York Times Company v. Sullivan, 376 U.S. 254 (1964) 15
Olmstead v. United States, 277 U.S. 438 (1928) 18
Pennekamp v. Florida, 328 U.S. 331 (1946) 15
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United States v. Butler, 297 U.S. 1 (1936) 8
Village of Arlington Heights v. Metropolitan Housing Development Corporation, cert. granted, ... U.S. ....., 96 S. Ct. 560 (1975) 8
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Walker v. City of Belpre (1967), 14 Ohio App. 2d 17 7
Warth v. Seldin, 442 U.S. 490 (1975) 10
Washington v. Davis, ... U.S. ....., 96 S. Ct. 2040 (1976) 18, 19
Weaver v. Ham, 149 Tex. 309 (1950) 7
White v. Cincinnati (1956), 101 Ohio App. 160 7

Constitutional Provision

United States Constitution, Ninth Amendment 11

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Supreme Court of the United States

October Term, 1976
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JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its authorized law officer, the City Solicitor.

Parma was named a defendant in three separate federal court suits involving issues similar to those presented in the case at bar. Two of the actions resulted in judgments in favor of Parma and the Court denied certiorari.[1]

1. *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (1974), *cert. denied*, 419 U.S. 1108 (1975); *Cornelius v. City of Parma, Ohio*, 374 F. Supp. 730 (N.D. Ohio 1974), *cert. denied*, March 8, 1976 (No. 75-1012).

As this brief is being written, the third suit is pending in the District Court.[2] Although that pending action is factually distinguishable from the case at bar, and Parma has raised numerous defenses in addition to the issues herein presented for review, Parma's contentions have been strengthened by the Court of Appeals' decision in this case. Parma therefore has a vital interest in respectfully urging affirmance of the judgment of the Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

When the District Court exceeded its authority and ordered the City Council of Toledo, Ohio to pass a spot-zoning ordinance (to benefit a private builder seeking to build higher density, low-cost public housing in an area zoned for private residences) and also tried to treat this zoning litigation like a school desegregation case and ordered the "desegregation" of the entire city, the Court of Appeals for the Sixth Circuit properly instructed the District Court that it possessed neither legislative nor administrative power and was eminently correct in reversing the lower court's decision.

Federal Courts do not sit as super-legislatures, and federal judges are not authorized to legislate social policy on the basis of their own personal inclinations, but should exercise judicial self-restraint. There are limits to what a freedom-loving people, not broken in from birth to the ways of dictatorships, will tolerate from federal courts making essentially political decisions, especially when those decisions evidence a lack of understanding of the

2. Parma has filed a motion for summary judgment and is awaiting a ruling thereon.

realities of urban life and, in violation of Our Federalism, invade areas of concern constitutionally entrusted to the States and to the people.

There is no basis for the exercise of federal court authority in the mere fact that people of the same race or ethnic grouping congregate in their own separate residential areas. Proof of a discriminatory racial purpose is necessary to make out an equal protection violation. When, as here, there is no constitutional violation, a federal court should not concern itself with local legislative or administrative decisions.

ARGUMENT

Federalism Is a Cardinal Principle of Our System of Government

It is a cardinal principle of our system of government that local affairs shall be managed by local authorities, and general affairs by the central authority. *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889).

Justice Black, in *Karr v. Schmidt*, 401 U.S. 1201, 1203 (1971) stated:

> Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs.

Federal courts do not sit as super-legislatures. *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 423 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Griswold v. State of Connecticut*, 381 U.S. 479, 482 (1965). Nor

do they sit to determine whether a particular housing project is or is not desirable, for it is within the power of the legislature to determine that the community should be beautiful, spacious, and well-balanced. *Berman v. Parker,* 348 U.S. 26, 33 (1954).

We have a government of limited powers, and those limits pertain to the Courts as well as to Congress and the Executive. *Holtzman v. Schlesinger,* 414 U.S. 1304, 1315 (1973) (Justice Marshall).

It is the responsibility of federal courts and federal judges to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of their own personal inclinations. *Evans v. Abney,* 396 U.S. 435, 447 (1970).

The Court held in *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963), that "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation", and further held, at 730, that "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, which are elected to pass laws."

In *Lane County v. Oregon,* 74 U.S. (7 Wallace) 71, 76 (1868), the Court held:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in

union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."

Thus, within a short time after the nation was agonized by a civil war fought to preserve the Union, the Court eloquently affirmed the independence of the States within their sphere of authority. This principle is summed up in the term "Our Federalism", and is the foundation of our government.

Within a unitary court system, the principle of separation of powers governs the relations between the tripartite branches, and the authority of courts to intrude into the operations of the other branches is severely restricted. When, as here, the emphasis shifts to a determination of the authority of a federal court to intrude into the sphere

of activity of legislative and administrative bodies within a State, that doctrine's rationale applies as well to the delicate issues of federal-state relationships underlying this case."[3] When the frame of reference moves from a unitary court system to a system of federal courts "representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, ... U.S. ....., 96 S. Ct. 598, 608 (1976).

Sixth Circuit Court of Appeals' Decision Was Eminently Correct

This is precisely what the Sixth Circuit Court of Appeals did. It applied long-established and well-grounded constitutional principles, and a large measure of common sense, in reversing the erroneous decision of the District Court. The District Court had no authority to order members of the City Council to pass a new zoning ordinance or to "desegregate" the City of Toledo, and its attempt to do so was a raw misuse of judicial power which was properly nullified by the Court of Appeals.

This litigation was not instituted to vindicate any rights of minorities to acquire existing housing allegedly denied to them because of their race. Rather, the real purpose of the suit was to obtain a spot-zoning change and platting approval for Joseph Skilken and Company, a private, profit-making builder. There was no showing that the individual plaintiffs would actually purchase the housing units if built, or that they could claim a prefer-

3. *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974).

ence over prospective nonminority purchasers of the proposed housing units without violating federal and state antidiscrimination laws. In reality, the suit was for the immediate benefit of Skilken. There is no constitutional guarantee of access to dwellings of a particular quality.[4]

No one has a constitutional right to spot zoning, either. Rather, as the leading case of *Weaver v. Ham*, 149 Tex. 309 (1950), held in Syl. 4:

> Where a city has by its basic zoning ordinance declared a certain portion of that city to be in Zone A, or a residential district, an amendatory ordinance changing a named block in said district to Zone D, or apartment house district, constituted unjustifiable "spot zoning", and was, therefore, void.

The rationale of the *Weaver* case, prohibiting such unjustifiable spot zoning, has been adopted in Ohio. See *White v. Cincinnati* (1956), 101 Ohio App. 160; *Walker v. City of Belpre* (1967), 14 Ohio App. 2d 17.

Moreover, there are ample administrative and judicial remedies under Ohio law if Skilken desired to claim its rights were being violated. See *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 2d 263. If every builder or real-estate speculator could seek to be free of the constraints of local building and zoning ordinances and avoid State administrative and judicial proceedings by the device of joining nominal minority plaintiffs and filing suit in federal court, the floodgates of litigation would be opened. Anytime any builder did not get his way when seeking to build any kind of housing, or even a motel or restaurant or factory, the National Committee Against Discrimination in Housing, or similar group, could recruit minority persons

4. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

to become nominal plaintiffs to allege their rights to potential housing or public accommodations or jobs were being violated, even though the majority of persons would be equally so deprived if the construction did not go forward. However, federal courts are courts of limited jurisdiction. "It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities." *Rockbridge Associates, Ltd. v. Pruitt,* 341 F. Supp. 703, 705 (N.D. Ga. 1971), *affd. en banc,* 491 F.2d 5 (5th Cir. 1974), *cert. denied,* 419 U.S. 837 (1974).

Justice Stone, in the oft-quoted language of his dissent in *United States v. Butler,* 297 U.S. 1, 79 (1936), cogently observed that "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." The Court of Appeals exemplified the quintessence of judicial self-restraint in reminding the District Court that it possessed only adjudicative but not legislative or administrative power.

Petitioners' Reliance on Village of Arlington Heights v. Metropolitan Housing Development Corporation Is Misplaced

Petitioners rely heavily on *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* No. 75-616, pending in this Court on a writ of certiorari. Their reliance on that case is misplaced. The District Court[5] properly entered judgment for the municipality and its officials, but although the Court of Appeals for the Seventh Circuit did not rule that any of its findings

5. *Metropolitan Housing Development Corporation v. Village of Arlington Heights,* 373 F. Supp. 208 (N.D. Ill. 1974).

were clearly erroneous, the Court of Appeals reversed the District Court's well-reasoned judgment.

In that case, suit was instituted to force Arlington Heights to order a spot-zoning change for a 15-acre tract of land, to permit a multi-family attached residence use (such as apartments) in an area zoned for and consisting of single-family detached residences.

The project that the corporate plaintiff wanted to construct in the single-family residential zone was to have been financed under Sec. 236 of the National Housing Act of 1968. At the time the District Court's decision was rendered, the President had imposed a moratorium on funding Sec. 236 projects. Those projects had come under severe criticism for serious deficiencies, excessive costs, and limited benefits.[6] As the District Court observed, the spot rezoning would stand and be well-nigh irreversible even though the project is not built, "and many varieties of buildings could then be constructed by the legal owners in the midst of the existing single-family residential area."[7] If Metropolitan could build what it wanted in the midst of a single-family residential area, any property owner could build apartments there with the inevitable consequence that those "apartment houses, which in a different environment would not only be un-

6. See *e.g.* the HUD publication HOUSING IN THE SEVENTIES (1973) (esp. pp. 4-57 for a summary of ten critical findings against Sec. 236 projects). The report of the Congressional Research Service of the Library of Congress for the Senate Committee on Banking, Housing and Urban Affairs entitled AN ANALYSIS OF SECTION 235 AND 236 PROGRAMS (May 24, 1973) pointed out that while nonprofit sponsors had accounted for 28% of Sec. 236 projects they accounted for 67% of the projects in financial difficulties (p. 31).

7. 373 F. Supp., at 211.

objectionable but highly desirable [would] come very near to being nuisances."[8]

As in Ohio, Illinois courts hold that a change of zone applicable to only a small area, and a change which is out of harmony with comprehensive planning for the good of the community as a whole, constitutes illegal spot zoning.[9] Also like Ohio, Illinois provides ample State administrative and judicial procedures for deciding zoning matters, which are in the last analysis the epitome of a local rather than a federal concern.

The District Court specifically found that the three individual plaintiffs did not represent a class, and held plaintiffs did not prove discrimination against racial minorities as distinguished from the underprivileged generally. The lack of housing for low earners in the suburban area affects the entire group, not merely blacks or Mexican-Americans.[10]

This Court held in *Warth v. Seldin*, 422 U.S. 490, 508 (1975), that "Absent the necessary allegations of a demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the Court's ruling would be applied.' *Schlesinger v. Reservists to Stop the War*, 418 U.S., at 221-222."

With one judge dissenting, the Court of Appeals, speaking through Judge Swygert, assumed the role of a superlegislature to alleviate the problem it saw in "de facto

8. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

9. *Duryea v. City of Rolling Meadows*, 119 Ill. App. 2d 445 (1970).

10. 373 F. Supp., at 210.

segregated housing", and accused Arlington Heights of "exploiting the problem *by allowing itself to become an almost one hundred percent white community.*"[11] (Emphasis added.) There was no citation of authority for that remarkable *ipse dixit*.

What was left unsaid by Judge Swygert is equally mind-boggling. How should a community proceed to prevent "allowing itself to become an almost one hundred percent white community"? Should it erect an "Arlington Heights Wall", to become as infamous as the "Berlin Wall", including barbed wire and itchy-fingered armed guards to prevent determined whites (exceeding some arbitrary quota) from attempting to take up residence in the community?

How could any community constitutionally require white persons, who desire to terminate their constitutional right to travel by residing in that community, to keep on travelling? And what if alternate destinations are also "over quota" for whites? Municipal officials do not assign their residents to particular housing units within the community, nor do they build the housing, unlike school authorities who built schools and assigned pupils to their neighborhoods schools. Government officials have no constitutional or legal authority to tell Americans where to live. A man's home is his castle, and surely his right to choose it freely is one of the unenumerated rights reserved under the Ninth Amendment.

Behind the Iron Curtain today, people must carry identity cards and permits dictating in what community they may live.[12] That may be one method of attempting to enforce a "desegregation" order against the entire popu-

11. 517 F.2d 409, 414.

12. HEDRICK SMITH, THE RUSSIANS 77 (New York: Quadrangle, 1976).

lation, as District Judge Young attempted to do in the case at bar before he was advised of the limits of his authority by the Court of Appeals for the Sixth Circuit, and of policing a federally-imposed municipal policy of not "allowing itself to become an almost one hundred percent white community". But would such regimentation be tolerated by the American people, devoted to the concept of freedom and not broken in from birth to the ways of dictatorships?

True, there have been instances when people in America have been forced to move against their wills. But most Americans today regard with a sense of shame the herding of the native Americans, whose skin color was red, to reservations, and forcing others, whose skin color was yellow, from their homes in California. Hopefully, no American today, whether considered "white" or "black" or "yellow" or "red" would accept with docility such a forced migration, or one as that depicted so poignantly in *Fiddler on the Roof*. Yet, as with forced busing of school children, lower federal courts seem to know of no other way to "desegregate", ultimately, except by enforcing quotas through movement of bodies.[13] While concern for

13. In his perceptive article in The Wall Street Journal of June 17, 1976 (p. 14), Professor Irving Kristol discusses how the persistence of lower federal courts in continuing to order forced busing in the face of overwhelming evidence that it just doesn't work (either to maintain the set quota, or in improving educational achievement, or in fostering racial harmony) is explicable as an example of "cognitive dissonance"—the phenomenon whereby people who believe strongly in a set of ideas will tend to reaffirm those ideas most vigorously at the very moment when they are repudiated by reality. Busing doesn't work to improve achievement even when voluntary and has community support. See *How Busing Failed in Riverside* in the June 1976 issue of PSYCHOLOGY TODAY, pp. 66 ff. The problem should not be compounded by extending the discredited ordering of forced busing to ordering forced housing. The cry is often heard that refusal to extend coercive decrees (that do not produce the intended desired results in the field of schooling) to other areas, such as housing, would be a "step backward". But it would be prudent to "step backward" rather than to step forward and fall off a cliff.

the safety of children has, with some notable exceptions, resulted in resentful but relatively nonviolent acceptance of forced busing, it is submitted that the more drastic and all-embracing type of people-movement, which forced residential-allocation would ultimately and ineluctably require, would not be tolerated in this land of the free. The fascinating study of what causes people to rebel bears this out:

> If a highly legitimate regime imposes a policy that substantially violates popular expectations about what the regime should do, people are motivated to protest the policy not only because of the direct deprivation it imposes but because it is inconsistent with their image of the regime. If the regime resists pressure to change through normal channels, participatory RD [relative deprivation] may increase to the point at which demonstrative violence occurs, directed against both the policy and the incumbents who imposed it. As a last resort, intensely discontented citizens may feel that a highly legitimate political unit can be preserved only by violent opposition to both incumbents and institutions which are acting in an improper, i.e. illegitimate way.[14]

14. TED ROBERT GURR, WHY MEN REBEL 186 (Princeton, New Jersey: Princeton University Press, 1970). Studies of popular uprisings and revolts throughout history reveal a recurring cause: governments which seek to reduce all to uniformity and equality "in the service of the state, riding roughshod over local privileges and traditional liberties . . . [and raising] the hackles of entire groups of people when they were confronted with the coldness of the law, of these impersonal decisions handed down from afar, by persons who were unknown to them or merely names . . . Without intending it, probably, but pushed forward by jurists who were imbued with ideas of equality and 'reasons of state' . . . [government officials] were carrying forward a slow revolution which made many people feel something like the cold hand of death upon them and provoked violent reactions." ROLAND MOUSNIER, PEASANT UPRISINGS IN SEVENTEENTH CENTURY FRANCE, RUSSIA, AND CHINA 330 (New York: Harper & Row, 1967). For

(Continued on following page)

Political Decisions Invite Political Reaction

In his penetrating essay, THE JUDICIAL PROCESS,[15] Dean Erwin N. Griswold reflects on the abuses of unrestrained incursions of the judiciary into areas traditionally reserved to the popular branches of government:

> If the courts take on more and more of the basic decisions of operating the government, then obviously they become more and more involved in what are essentially political decisions, of the sort that have traditionally been made by the legislative or executive branches of the government. Whatever else may be said for this, it is not the democratic way. Indeed it tends to be quite undemocractic, and there may be some who feel that some of the results are reached because the judiciary do not really trust or favor the democratic process . . . In any event, "modern judicial policies" which "seek to push the United States along the paths of virtue"[16] inevitably involve the courts more and more in essentially political decisions, which then invite and indeed require political reaction.

Judges who assume political roles are therefore subject to the same "uninhibited, robust, and wide-open" debate,

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Footnote continued—
historical studies of popular reactions against the law and courts in the context of revolutions, see CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (Chapel Hill: The University of North Carolina Press, 1960); STUART E. PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION 1640-1660 (The Hague: Martinus Nijhoff, 1966). More recently, coal miners in West Virginia and surrounding areas engaged in a wildcat strike to protest their grievances against federal court orders (Washington Post, Aug. 12, 1976, pp. A1 and A3).

15. New York: The Association of the Bar of the City of New York, 1973, at 28-29.

16. ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 343 (1972).

that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks".[17]

Justice Cardozo understood that "A fertile source of perversion in constitutional theory is the tyranny of labels",[18] and Justice Frankfurter taught that "It is the part of wisdom, particularly for judges, not to be victimized by words",[19] for there is "a tendency . . . whereby phrases are made to do service for critical analysis by being turned into dogma."[20]

Judges who seem to have an *idée fixe* about the term "segregation" come to aberrant conclusions about the role of the judiciary in a free society and its ability to solve delicate problems intrinsic to human relations. The term "segregation" originally meant "An enforced separation of races, particularly the white and colored races, as under statutes and constitutions providing for the separate education of colored and white children." BALLENTINE'S LAW DICTIONARY (3d Edition) 1156. In school cases, the modifiers *"de jure"* and *"de facto"* were added to delineate situations wherein judicial remedies may be appropriate, and those wherein no judicial intervention is warranted.

To apply the term "segregation" to the existence of racial concentrations in urban residential areas is both misleading and productive of fuzzy thinking, for it begs the question and ignores the element of free choice of residences. Its use is one of the worst examples of the mischief caused by the phenomenon sometimes called "incrementalism", or, as described by Dean Griswold, a process whereby "a sort of decisional leapfrogging takes over

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17. *The New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).

18. *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

19. *Shapiro v. United States*, 335 U.S. 1, 56 (1948).

20. *Pennekamp v. Florida*, 328 U.S. 331, 352 (1946).

as a principle expands: the first decision is distilled from the language of the Constitution, but the next expansion begins from the reasoning of the last decision, and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored."[21]

When judges see residential concentrations only in terms of a "two-class theory", i.e. black and white,[22] they reveal a lack of understanding concerning the realities of urban life. As the eminent urbanologist, Professor Edward C. Banfield, pointed out in his classic work,[23] "In every large city ethnic groups of the second, third, fourth and even later generations—Irish, German, Scandinavian, Polish, Jewish, and Italian, among others—lived in self-imposed isolation and sent their children to schools that were to a high degree homogeneous."[24]

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21. THE JUDICIAL PROCESS, *supra*, at 19.

22. *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

23. THE UNHEAVENLY CITY, 81 (Boston: Little, Brown and Company, 1970).

24. There are numerous recent books and articles discussing renewed ethnic and religio-ethnic awareness, and the natural congregation of like with like. For example, David Danzig in his article entitled *The Social Framework of Ethnic Conflict in America*, in OVERCOMING MIDDLE CLASS RAGE, 251-253 (Philadelphia: The Westminster Press, 1971) says "The widespread existence of such subcommunities and their importance have made our society vastly more complex than our ideas of town-hall democracy would allow us to believe. In one set of circumstances we strive to live up to the principle 'regardless of' race, color and creed; in other circumstances *race, color,* and *creed* are the very principle by which human relationships are organized. Gunnar Myrdal in my view failed to understand American society when he assumed that this contradictory behavior reflected a moral dilemma. On the contrary, this is the accepted differentiated structure of our social order."

In their article entitled *A Resurgence of Ethnicity?* by Nathan Glazer and Daniel Patrick Moynihan in RACE AND ETHNICITY IN MODERN AMERICA, pp. 115-123 (Lexington: D.C. Heath Company, 1974), the authors point out that "Just as blacks now want to gather together in distinctive institutions where they can strengthen specifically black social, cultural, and political tendencies, so do other groups".

In the same work, Banfield[25] points out that like everyone else, blacks prefer to live among people whose class culture is not very different from their own, and he warns that the "practice of calling all Negro neighborhoods 'segregated' and 'ghettoes' misrepresents the situation seriously and perhaps dangerously." He further deplores the semantic confusion arising from labelling all-black neighborhoods "segregated", without taking into account such factors as immigration of large numbers of unskilled Negro workers into urban areas and occupying all the low-cost housing then available, as well as their own neighborhood preferences. Roy Innis, leader of CORE, is an articulate spokesman for the view of some black leaders that, at least for a time, separatism is as useful and natural for many blacks as it is for other ethnic groups.[26] Moreover, court-ordered, forced dispersal of blacks from areas in which they are concentrated would severely dilute the political gains made through election of black public officials from such districts and the ability to control their own institutions.

Thus, it is not a simple matter of "black and white"; there are many gray areas with respect to understanding the social and psychological aspects of residential housing patterns.

Courts are not as competent as are the political branches to attempt to ameliorate intractable social problems, and court orders tend to be rigid, doctrinaire, and the very antithesis of democracy. For example, the District Court issued a "desegregation" order which would of necessity have affected the majority population of Toledo as well as the minority, but refused to allow inter-

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25. *Ibid.* pp. 79-87.

26. See, *e.g.* Interview, in AFRICA REPORT, January-February, 1973, 34-35, comparing blacks with Jews. See also, Thomas Sowell, *A Black "Conservative" Dissents*, NEW YORK TIMES MAGAZINE, Aug. 8, 1976.

vention by persons most to be affected by the real purpose of the suit. "Integration" is not commanded by the Constitution. Due Process is. In both *Skilken* and *Arlington Heights*, suits to benefit builders were expanded beyond the narrow issues of the actions to involve novel issues and to set new precedents not contemplated by the issues raised by the parties. Even if the decisions rendered by the District Judge in *Skilken* and by the Court of Appeals in *Arlington Heights* were the products of the purest motives and not the exercise of raw judicial power, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[27]

CONCLUSION

Although the District Court treated this action (to obtain a spot-zoning change) like a school desegregation case, it failed to apply "the basic equal protection principle that the invidious quality of a law must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.' *Keyes v. School District No. 1*, 413 U.S. 189, 205, 208 (1973). See also *id.*, at 199, 211, 213." *Washington v. Davis*, ... U.S. ....., 96 S. Ct. 2040, 2048 (1976).

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27. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

In the case at bar, the District Court inferred that the refusal to spot zone would have a disproportionate racial impact, but that was only conjecture. However, *Washington v. Davis*, 96 S. Ct., at 2050, clearly teaches that proof of discriminatory racial purpose is necessary to make out an equal protection violation. Therefore, the decision of the Court of Appeals for the Sixth Circuit was eminently correct and should be affirmed. The Court of Appeals correctly applied the law enunciated by the Court, upheld the vital principles of Our Federalism, and promoted democratic principles and the concept of liberty. "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny." *Reid v. Covert*, 354 U.S. 1, 40 (1957).

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